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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN M. HEIN; MARLENE HEIN,

Petitioners,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION; BURTON MCNEIL, acting as HOWARD SAVINGS BANK PENSION PLAN ADMINISTRATOR AND HOWARD SAVINGS BANK PENSION PLAN;

Burton McNeil and the Retirement Plan of the Howard Savings Bank,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this era of rampant corporate restructuring, should an employee forfeit his fully-funded pension benefits, solely as a result of his employer going into FDIC receivership forty-one working days shy of his retirement date?

PARTIES TO THE PROCEEDING

The parties to the proceedings below included Petitioners, John M. Hein and Marlene Hein (plaintiff-appellees below); Federal Deposit Insurance Corporation and Respondents, Burton McNeil ("McNeil"), acting individually and as Howard Savings Bank Pension Plan Administrator; Howard Savings Bank Pension Plan; and the Retirement Plan of the Howard Savings Bank (the "Plan") (defendant-appellants below).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John M. Hein and Marlene Hein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Third Circuit entered in the proceeding on June 28, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, is published at 88 F.3d 210 (3d Cir. 1996) and the slip opinion is reprinted in the appendix hereto at App. 1a.

The "opinion and order" of the United States District Court for the District of New Jersey is unpublished and appears in slip opinion form in the appendix hereto at App. 28a.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1982).

STATUTE INVOLVED

Employment Retirement Income Security Act ("ERISA") Section 204(g), codified at 28 U.S.C. 1054(g), is set forth at App.

STATEMENT OF THE CASE

I. The Material Facts.

In 1955, shortly after he graduated from high school at age seventeen, Petitioner John Hein began a long career with the Howard Savings Bank ("the Bank"). Within a year, he became a participant in the Retirement Plan of the Howard Savings Bank, an employee benefit plan ("Plan") established and maintained by the Bank. Since 1974, the Plan has been governed by ERISA, 29 U.S.C. § 1001, *et seq*. The Plan contains a section, known as the "Rule of 90," that provides, in conjunction with a section entitled "Unreduced Early Retirement Benefits," that upon a participant's attainment of a combi-

nation of ninety years of both age plus years of service, the participant qualifies to retire and collect full pension benefits.

A. The Accrual of Benefits

Hein began with the Bank as a messenger. As a result of his hard work and ability, he was promoted to positions of increasing responsibility, culminating with Vice-President of Contingency Planning. During the first thirty years of his thirty-seven year career at the Bank, the Bank contributed to the Plan on behalf of Hein, fully funding Hein's retirement benefit. After thirty years, Hein had reached the maximum number of years of credited service and could not accumulate any further benefits under the Plan.[1] Accordingly, in March of 1992, nine months before his fifty-fifth birthday, after exceeding the number of years of service (thirty-five) required to qualify for unreduced early retirement benefits at age fifty-five, Hein requested a summary of his benefit options from the Plan's actuary, Towers Perrin, in order to make arrangements for his retirement. At that time, Hein anticipated retiring on December 31, 1992, five days after his fifty-fifth birthday. In April 1992, Hein received a written report from Towers Perrin, through his employer, confirming that the Bank had fully funded his benefits under the Plan. Having confirmed that he would receive unreduced early retirement benefits, he began making plans for his retirement.[2]

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[1] The retirement plan states: "You can receive up to a maximum of 360 months (30 years) of Credited Service if you were employed before January 1, 1982 . . . ." App. at 123a.

[2] In reliance on this confirmation of his entitlement to unreduced benefits, conversations with the Bank Human Resources Department, and the Plan documents, Hein and his wife entered into a contract for substantial renovations to a small home in the Adirondack mountains of New York where he and his wife intended to retire.

B. The Appointment of the FDIC as Receiver and McNeil as Plan Administrator

On October 2, 1992, forty-one working days before Hein's planned retirement date, the FDIC was appointed Receiver for the Bank. On the same day, the FDIC, acting as Receiver of the Howard Savings Bank ("FDIC-Receiver"), the FDIC, acting in its corporate capacity ("FDIC-Corporate"), and First Fidelity Bank, N.A. ("First Fidelity"), entered into a Purchase and Assumption Agreement ("P&A Agreement") negotiated by FDIC-Corporate. Under that agreement, First Fidelity agreed to assume certain assets and liabilities of the Howard Savings Bank.

In the alleged interest of providing the successor bank with a "clean transaction," and contrary to the interests of the Bank's employees, FDIC-Corporate declined to include the Plan and its assets as part of the negotiations. Instead, the Plan was transferred to the FDIC-Receiver, and McNeil, an FDIC employee, was named Plan Administrator.

Prior to his appointment as Plan Administrator, McNeil never administered *any* pension plan nor had he ever had any education or training in pension administration or ERISA. As Plan Administrator, McNeil is the named fiduciary with respect to the Plan. Following his appointment, McNeil was responsible for the selection, appointment, and retention of First Fidelity Bank as the Trustee of the Plan. The Plan's funding was in excess of the amount needed to satisfy accrued benefits at the time the FDIC was appointed Receiver.

Soon after being appointed Receiver, the FDIC issued a notice to all employees of the Bank, including Hein, indicating that their employment with the Bank was terminated. Pursuant to the P&A Agreement, First Fidelity continued to run all of the branches of the Bank without interruption. Hein, like most of the Bank's employees, continued in his same position at the same building, same office, same desk, and with the same duties. He also remained a member of and par-

ticipant in the Plan throughout his employment.[3] On December 31, 1992, following his fifty-fifth birthday, Hein retired.

C. The Denial of Hein's Claim for Early Retirement Benefits

In January 1993, Hein requested his fully funded, unreduced early retirement benefits under the Plan, through the FDIC. McNeil, as Plan Administrator, denied Hein's claim in a letter dated February 10, 1993. McNeil informed Hein that he would receive substantially reduced retirement benefits, or approximately one-third of the full benefits funded by the Bank and accrued under the Rule of 90.[4]

McNeil ruled that Hein's termination by the FDIC three months before his birthday left Hein three months (or approximately forty-one working days) shy of the minimum age under the Rule of 90. The decision neglected Hein's thirty-seven years with the Bank and the three additional months of employment at the same desk with the Bank's successor during which Hein reached the age of fifty-five. While expressly acknowledging in his letter that "the Plan does *not* specifically state that an employee must be in active service in order to retire," McNeil decided that Hein's "termination" by the FDIC permitted him to deny Hein's claim for benefits. McNeil's decision did not take into account that the benefits had been fully funded by contributions by the Bank during a thirty-year period, culminating six years before the FDIC was appointed Receiver for the Bank.

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[3] "Member means any employee who qualifies and continues to be qualified under Section IV, including in appropriate cases a qualified employee whose service is terminated, but who is or may become entitled to receive Retirement Income, whether commencing at such termination or at a later date." App. at 52a.

[4] McNeil proposed to pay the Heins reduced benefits totalling $1,027.39 monthly, rather than unreduced benefits, which would have amounted to $2,943.44 monthly, a considerable difference to a relatively young retired couple living on a fixed income.

II. Proceedings

Petitioners, John and Marlene Hein filed a Complaint with the United States District Court for District of New Jersey on June 2, 1993, seeking unreduced early retirement benefits. They named as defendants the FDIC, McNeil, individually and as Administrator of the Retirement Plan of the Howard Savings Bank, and the Plan. After conducting discovery, on April 21, 1994, the Heins amended their Complaint, adding two Counts.[5]

In the Complaint, Petitioners alleged that they are entitled to unreduced early retirement benefits and attorneys fees incurred in vindicating their claim for benefits. Hein argued that during the first thirty years of his thirty-seven year employment, the Bank made contributions to the Plan on his behalf, maximizing the years of credited service permitted under the Plan. Petitioner explained that after thirty-seven years of service and at age fifty-three, he satisfied the Plan's "Rule of 90," which required that Hein accrue a combination of ninety years of service and age to qualify for full retirement benefits. Thus, Hein maintained, he was eligible to begin drawing his full pension on his fifty-fifth birthday.

Alternatively, Hein asserted that even if he could not qualify for benefits until reaching age fifty-five, he still satisfied the age requirement pursuant to the "same desk rule," which recognizes service with a successor-employer. Petitioner alleged that the same desk rule applied regardless of whether the Plan's assets are acquired by the successor-employer. Furthermore, Hein asserted that he had not only met, but exceeded, the thirty years of credited service permitted by the Plan. Accordingly, nothing would have been added to, or sub-

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[5] Count One of the Amended Complaint seeks a declaration that the Heins are entitled to unreduced early retirement benefits. Counts Two and Three assert that defendants are equitably estopped from denying the Heins unreduced early retirement benefits. In Counts Four, Five, and Six, the Heins assert that defendants breached their fiduciary duties.

tracted from the Plan's assets with respect to Hein during his three months of service with his successor-employer, regardless of who held the assets of the Plan. Thus, he qualified for benefits while in the employ of the successor bank, First Fidelity, regardless of the purported termination by the FDIC, following its appointment as receiver. Finally, Petitioner alleged that McNeil's incorrect interpretation of the Plan, disregarding Hein's three months of same desk service with the successor bank, functioned as an amendment to the Plan, invoking the protection extended by ERISA to early retirement benefits.

The FDIC filed a motion for summary judgment against plaintiffs, followed shortly thereafter by a motion for summary judgment by McNeil and the Plan against the Heins. The Heins filed opposition to the FDIC's motion and cross-moved for summary judgment against McNeil and the Plan, seeking an order that McNeil and the Plan provide unreduced early retirement benefits, attorney's fees, and costs of suit.

On September 13, 1994, the district court granted summary judgment in favor of the Heins, finding that the Heins were entitled to unreduced early retirement benefits. *Hein v. Federal Deposit Insurance Corp.*, No. 93-2418, slip. op. at 6 (D.N.J. Sep. 13, 1994), App. at 32a. The district court determined that McNeil's interpretation of the Plan, resulting in the denial of Hein's claim for unreduced early retirement benefits, constituted an amendment to the Plan in contravention of the protection afforded by section 204(g) of ERISA, 29 U.S.C. 1054(g), and recognized by the court in *Gillis v. Hoechst v. Celanese Corp.*, 4 F.3d 1137 (3d Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 1369, 128 L. Ed. 2d 192 (1994). *Hein v. FDIC*, slip. op. at 11-12, App. at 36a-37a. The district court also determined that despite Hein's purported termination by the FDIC, Hein qualified for unreduced early retirement benefits while in the employ of the successor bank. *Id.* at 12, App. at 37a. The court declined to rule on Petitioners' other claims against the FDIC because full relief was

being granted on Count One against McNeil and the Plan. *Id.* at 13, App. at 38a.

Following entry of the September 13 Order, the FDIC moved for reargument pursuant to Local Rule 12(l). Petitioners opposed that motion, and the district court denied it. When agreement on counsel fees could not be reached with McNeil's and the Plan's counsel, Petitioners moved for attorney's fees and costs, pursuant to ERISA. In addition to filing a Notice of Appeal of the district court's Order, McNeil and the Plan cross-moved and opposed Petitioner's motion for fees.

After hearing oral argument on January 30, 1995, the district court denied the FDIC's motion for reargument and Respondents' cross-motion for a stay of the fee application. The district court entered an Order on February 22, 1995 awarding Petitioners fees in the amount of $70,353.83 and set forth a summary of its analysis in an Opinion Letter of the same date. App. at 41a. Respondents filed notices of appeal.

The Court of Appeals for the Third Circuit, relying on a case following *Gillis*, *Dade v. North American Philips Corp.*, 68 F.3d 1558 (3d Cir.1995), reversed and remanded the case to enter judgment for Respondents. *Hein v. FDIC*, 88 F.3d 210, 213 (3d Cir. 1996), App. at 3a. Hein now files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION IS ONE OF EXCEPTIONAL IMPORTANCE

The current landscape of corporate America is one filled with mergers, acquisitions, and work-force reductions. *See, e.g.*, Adam D. Chinn, *Employee Benefit Issues in Mergers and Acquisitions*, 10 PRENTICE HALL LAW AND BUS. INSIGHTS 14 (Mar. 1996) (noting that "with increased merger and acquisition activity over the past year, companies are realizing the

significant impact that employee benefit issues be raised early on in any merger discussions" and finding that "[the] continuing wave of mergers across industry lines makes . . . the protection of [ ] employee benefits in the context of a merger and other combinations especially timely"); Deborah Shalowitz Cowans, *Mergers Yield Benefit Options*, CRAIN COMMS., INC. BUS. INSIGHTS (Dec. 18, 1995) (directing "employee benefits managers [to] take note: Mergermania is back"); Jill Rosenberg and Ruth Raisfeld, *Effective Use of Releases to Minimize Liability During Downsizing but Some Litigation May Be Inevitable*, 216 N.Y.L.J. __ (July 8, 1996) (noting that "[a]mong the current trends in employment relations are corporate reductions in force (RIFs), layoffs and restructuring - colloquially referred to as 'downsizing' "); Howard S. Denburg and Donald P. Carleen, *Communicating an Early Retirement Program*, 211 N.Y.L.J. __ (March 31, 1994) (commenting that:

> Almost every day another company announces a work force reduction in order to cut costs. These downsizings are most often accompanied by an early retirement package designed to encourage voluntary retirement and avoid involuntary layoffs. These early retirement programs have spawned litigation by employees who terminated employment just before a program goes into effect and claim that they were misled by company personnel as to the timing of the program and therefore into rehiring when they did.)

At a time when Americans are getting older and living longer, the impact of such corporate restructuring is only compounded by the uncertain fate of our nation's social security system. Given this backdrop, it is not surprising that pensions and retirement benefits have become so critical to the survival of so many American workers.[6] *See* Michael S.

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[6] John McCarron of the Chicago Tribune recently published an article in which he recounted the experience of one victim of downsiz-

Katzke, *Developments in change of control related employee benefits*, 10 INSIGHTS 15 (Mar. 1996) (finding that "the recent resurgence in merger and acquisition activity has placed a renewed importance on the treatment of employee benefits arrangements in such transactions"). As a result, the role of pensions is even playing an important part in presidential politics. *See generally*, Patricia B. Limbacher, *Clinton, Dole Get Pension Wake Up Call*, CRAIN COMMS., INC. PENSIONS AND INVESTMENTS (Apr. 15, 1996).

Congress recognized the importance of protecting the benefits of hard-working employees through passage of the ERISA. "ERISA is a comprehensive statutory scheme designed to protect employees enrolled in pension and benefit plans." *Northeast Dep't ILGWA Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 162 (3d. Cir. 1985). As a remedial statute, it must be "liberally construed in favor of protecting participants in an employee benefit plan." *Board of Trustees of Trucking Employees of New Jersey-Welfare Fund, Inc. Pension Fund v. Centra*, 983 F.2d 495 (3d Cir. 1992). Section 204(g) of ERISA, codified at 29 U.S.C. § 1054(g), and its parallel section of the Internal Revenue Code, 26 U.S.C. § 411(d)(6), prohibit the elimination or reduction of an accrued benefit, early

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ing. John McCarron, *For Middle-Age Workers a Scary, Non-Linear Story*, CHI. TRIB. (Aug. 28, 1994). The downsizing victim explained that downsizing,

> is done to obtain large amounts of cash that can be used to boost stock price, to expand or do whatever the corporation deems appropriate, including large bonuses and stock options for senior officers.

Id. The worker observed:

> what is lost in all this rush for money is the social responsibility these companies should practice toward their employees and their communities. Instead, they have chosen to turn their backs on a large number of middle-aged Americans who unfortunately believed what these companies told them when they were working.

Id.

retirement benefit, retirement-type subsidy, or optional form of benefit by an amendment to a plan.

Congress likewise recognized the need explicitly to protect early retirement benefits. Accordingly, in 1984, Congress passed the Retirement Equity Act ("REA") "to protect early retirement benefits in certain circumstances." *Hein v. FDIC*, slip. op. at 9, App. at 34a. Congress amended the specific section in question in this case, by appending subsection 204(g)(2), which adds early retirement benefits to those protected from elimination or reduction.

Although Section 204(g) does not consider early retirement benefits to be the same as accrued benefits, it *treats* them the same for purposes of protection from reduction.[7] Therefore, "a plan amendment that has the effect of—(A) eliminating or reducing an early retirement benefit . . . shall be treated as reducing accrued benefits." ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2).

The inclusion of early retirement benefits under the protective scope of Section 204(g) has been expressly recognized by a number of courts. In *Gillis v. Hoechst v. Celanese Corp.*, 4 F.3d 1137, the Third Circuit Court of Appeals concluded that Congress intended to protect early retirement benefits from amendments that had the effect of reducing or eliminating them. *Id.* at 1153. *See also Adams v. Ford Motor Co.*, 847 Supp. 1365, 1383 (E.D. Mich. 1994); *Kay v. Thrift and Profit Sharing Plan*, 780 F.Supp. 1447 (E.D. Pa. 1991); *Hollingshead v. Bulford Equip. Co.*, 747 F.Supp. 1421, 1433 (1990), *reconsid. denied*, 809 F.Supp. 906, 917-18 (1992), *later proceeding*, 828 F. Supp. 906 (M.D. Ala. 1993).

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[7] "Accrued benefits" under § 3(23)A of ERISA, 29 U.S.C. § 1002(23)(A), means:

> in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefits commencing at normal retirement age.

29 U.S.C. § 1002(23)(A).

Notwithstanding Congress' attempts to protect the benefits of hard working employees, one author observed:

> Although ERISA guarantees that workers who qualify for pension benefits of whatever sort are entitled to them if the plan sponsor changes, the law gets murky when it comes to workers who almost qualify for early retirement—for example, a 55-year-old woman with 30 years of service. In fact, many of the ERISA-inspired lawsuits that crop up involving mergers are brought by workers in their 50s who are caught in limbo.

Debbie Galant, *Pensions M&A*, 28 INSTITUTIONAL INVESTOR INC. (Dec. 1, 1994). Petitioner is a prime example of an employee who has been caught in "limbo." Mr. Hein is precisely the type of employee ERISA and the REA were designed to protect. Unfortunately, they have failed to protect him thus far in this case. Petitioner began his long career with the Bank at the age of seventeen and continued to work for the Bank for the next thirty-seven years. During the first thirty years of employment, the Bank contributed to the Plan on his behalf, fully funding his retirement benefits. After thirty years, Hein maximized the number of years of credited service and could not accumulate any further benefits under the Plan. After thirty-seven years of service and approaching the age of fifty-five, he inquired about his early retirement benefits. The Bank explained that he could receive his fully funded unreduced early retirement benefits when he reached age fifty five.

Forty-one working days shy of his retirement date, Hein was "terminated" when the Bank went into receivership under the FDIC. Hein, however, continued to work at the "same desk" for the successor bank for the next three months. When Hein requested his unreduced early retirement benefits from the Plan's administrator, his request was denied. Hein was informed that he had not reached the requisite age of fifty-five before he was terminated from the Howard Savings Bank and, therefore, had not met the requirements under the Plan.

The administrator did not count the time Hein worked for the successor bank towards satisfying the Plan's requirements for unreduced early retirement benefits and refused to allow Hein to "grow into" his already fully funded early retirement benefits. The Third Circuit Court of Appeals concluded that the plan administrator correctly denied Hein's benefits and that Section 204(g) was inapplicable in this case. *Hein v. FDIC*, 88 F.3d at 218, App. at 10a-12a.

The narrow reading by the Third Circuit Court of Appeals of Section 204(g) of ERISA: (1) denies protection to which petitioner is entitled under ERISA and (2) undermines the purpose of ERISA—to protect the pensions and benefits of career employees. In this case, Petitioner satisfied the Plan's "Rule of 90," reaching a combination of years of service (thirty-seven) and age (fifty-four) before he was terminated. Thus, according to the Plan, he was entitled to unreduced early retirement benefits at the time he was terminated from the Bank. Because ERISA operates to enforce pension plans already in place, it should have been applied to protect Hein's benefits. *See* ERISA § 204(g), 29 U.S.C. § 1054(g), App. at 158a.

Assuming Petitioner was required to reach the age of fifty-five before he was entitled to unreduced early retirement benefits, Petitioner still satisfied this requirement. Petitioner reached age 55 during his three months of employment with the successor bank. The denial of Petitioner's fully funded unreduced early retirement benefits operated as an amendment to the Plan, reducing Hein's monthly benefits from $2,943.44 (under the unreduced early retirement benefits) to $1,027.39 (under the reduced early retirement benefits). As the district court in this case found, such an amendment invokes the protection of section 204(g) of ERISA. *Hein v. FDIC*, slip. op. at 12, App. at 37a.

More important, by denying protection to Hein, the Third Circuit has sounded the death knell for the protection of the

early retirement benefits of all prospective petitioners like Mr. Hein. Corporate transactions will inevitably be structured to avoid continuation of corporate benefits contrary to the letter and the spirit of ERISA.

The purpose behind ERISA necessitates that Hein's unreduced early retirement benefits be protected. Mr. Hein maximized the number of years of credited service under the Bank's plan resulting in a fully funded retirement benefit, and he could *not* accumulate any further benefits under the plan. Petitioner simply needed to reach the requisite age to obtain access to these benefits. Petitioner should not be robbed of the opportunity to collect his well-deserved unreduced benefits after thirty-seven years of service simply because Howard Savings Bank went into receivership. This is especially true in light of the fact that Petitioner continued to work for the successor bank in the same position and at the same desk until he reached the age of retirement.

Given the surge in downsizing and corporate restructuring taking place in America today, it is likely that many more workers, who seek early retirement benefits, will confront the same problems faced by Mr. Hein. Many of these workers will have earned through years of service fully-funded retirement benefits and will be denied access to such benefits simply because they have been terminated from service due to a change in corporate structure. Such benefits will be denied, despite the fact that these employees continue to work in the same positions they held before the change in corporate structure because the transaction over which they had no control is structured in such a way as to cut off vested benefits.

The decision of the Third Circuit Court of Appeals creates a dangerous incentive and should be reversed. ERISA should be interpreted to protect the early retirement benefits of employees whose benefits are fully funded.

II. THE DECISION OF THE COURT OF APPEALS IN DENYING PETITIONER THE UNREDUCED EARLY RETIREMENT BENEFITS MISAPPREHENDS AND MISAPPLIES SECTION 204(G) OF ERISA.

The Court of Appeals for the Third Circuit, relying on *Dade v. North American Philips Corp.*, 68 F.3d 1558 (3d Cir. 1995), reversed and remanded the decision of the district court to enter judgement for respondents. *Id.* at 213, App. at 3a. Although recognizing "ERISA's broad scope and far-reaching effect," the court concluded that "ERISA neither mandates the creation of pension plans nor dictates the benefits to be afforded once a plan is created." *Id.* at 215 (citations omitted), App. at 7a. Thus, the court explained, "only the words of the Plan as written create an entitlement to benefits." *Id.*, App. at 7a. Reviewing the language of the Plan itself, the court found that Hein failed to qualify for unreduced benefits because he did not reach one of the specific qualifying combinations of age and years of service. *Id.*, App. at (citing *Hein v. FDIC*, slip. op. at 8, App. at 34a).[8]

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[8] Specifically, the court reviewed Section V of the Plan, which provides:

> 5(a) Any Member, . . . may retire on the first day of any calendar month in which he attains his fifty-fifth (55th) birthday and ten (10) years of service herein termed "Early Retirement Date."
>
> (b) If a Member retires on his Early Retirement Date, . . . (ii) payments of Retirement Income shall commence, at the option of the Member, either (x) on his Normal Retirement Date (in which event he will receive the amount of Retirement Annuity Benefits and/or Retirement Benefits which have accrued to his Early Retirement Date) or (y) on the first day of any month coinciding with or following his Early Retirement Date (in which event he will receive [actuarially reduced benefits]); provided, however, the foregoing reduction in benefits shall not be made if the Member has attained any combination of the ages and the years of Vesting Service, combinations set forth below on his Actual Retirement Date:

(footnote continued)

Next, the court examined Petitioners' claim that Section 204(g) of ERISA, allows Hein to fulfill the Plan's age requirements during employment in the same position with First Fidelity. *Id.* at 216, App. at 10a. Although recognizing that an erroneous interpretation of a Plan provision that results in improper denial of benefits may constitute a plan amendment, the court concluded that in this case, there was no such amendment. *Id.* at 216-17, App. at 10a-12a. The court explained that under the Plan's definitions of "actual retirement date," "employee," and "bank," Hein could not satisfy the conditions for the subsidy during employment with First Fidelity.[9] *Id.* at 217, App. at 12a. The court noted that First Fidelity was neither an affiliate nor a subsidiary of the Bank. *Id.* Therefore, the court observed, Hein could not satisfy the requirements of the Plan because he was no longer an employee of the Bank. *Id.* The Circuit Court concluded that Section 204(g) of ERISA was inoperative because it "can protect an entitlement to benefits but it cannot create an entitlement benefits when no entitlement exists under the terms of the Plan." *Id.*

Age on Actual Retirement Date	Vesting Service on Actual Retirement Date
55	35
56	34
57	33
58	32
59	31
60	30
61	29
62	20
63	20
64	20

App. at 61a-62a.

[9] The Plan defines the following terms as follows: (1) "Actual Retirement Date" is the "date on which an employee is terminated by retirement," (2) "employee" is "any person who is employed by the Bank and who received compensation from the Bank," and (3) "Bank" means "the Howard Saving Bank and any affiliate or subsidiary which shall adopt this Plan for its employees." App. at 48a-50a.

Reviewing the district court's ruling that Section 204(g) mandates the extension of early unreduced retirement benefits to Hein in this case, the Third Circuit found that under *Dade*, the district court's ruling was in error. *Id.*

The Third Circuit has misapplied *Dade* and misapprehended ERISA in this case. Furthermore, the conclusions of the Circuit Court operate to undermine the very purpose of ERISA, namely to protect the retirement benefits of long-term employees like Petitioner.

A. The denial of Hein's unreduced early retirement benefits is contrary to the express provisions of the Plan in question.

The Plan's Summary Plan Description ("SPD") states:

YOUR EARLY RETIREMENT BENEFIT

> If you choose to receive your pension early, the benefit is reduced to reflect the longer period of time over which you received benefits from the Plan. However, you can also decide to defer receiving your benefit until you reach normal retirement age. If you decide to do this, you will receive the full benefit calculated under the retirement formula. If you choose to receive your pension early, your benefit is reduced . . . [actuarially]. However, the Bank provides an important benefit to early retirees. *This reduction does not take effect if at retirement you have a certain minimum number of years of vesting service given your age as shown*

Age at Retirement	Minimum Years of Vesting Service at Retirement
55	35
56	34
57	33
58	32
59	31

Age at Retirement	Minimum Years of Vesting Service at Retirement
60	30
61	29
62	20
63	20
64	20

App. at 126a-127a.

As set forth in the SPD, early retirement benefits are generally reduced to reflect the longer period of time benefits are paid out to younger retirees. However, for members with twenty-six or more years of service, the Plan imposes a minimum age to begin to collect unreduced early retirement benefits. This minimum age to collect, combined with the service requirement, serves to limit the period of time benefits are paid out, given an individual's life expectancy. Thus, the Plan simply requires Plan members with long-term service to wait until a minimum age to begin to collect unreduced benefits.

In October of 1995, John Hein received a notice from Capital Service Corporation on behalf of Respondents informing him of the impending termination of the Plan and providing him with a revised SPD. Apparently, Respondents recognized the inconsistency inherent in their interpretation of the Plan, which denied that Hein retired in December 1992, and was entitled to unreduced benefits under the Plan. Accordingly, among other revisions, the Section underlined above has been amended and now reads in the revised SPD as follows:

> However, the Bank provides an important benefit to career employees. This reduction does not take place if, at *termination* you have a certain number of years of Vesting Service given your age as shown. . . .

Revised SPD (emphasis added). Thus, respondents have now substituted the word "termination" for the word "retirement,"

seeking to eliminate the purported ambiguity in their interpretation of the Plan.[10]

The revised SPD recognizes members may leave the Bank's employment and specifically provides as follows:

> *IF YOU LEAVE THE BANK BEFORE RETIRING*
>
> Not every employee will spend his or her entire career with the Bank. If you leave the Bank before retiring, you may still be entitled to receive a pension under the Plan's vesting provision. Vesting is a term used to denote ownership. When you are fully vested, you are entitled to a retirement benefit.
>
> You are fully vested in your pension when you complete 10 years of vesting service. Also, if you were a Plan participant before 12/1/85, you are automatically vested in the Plan at age 55 provided you are still a participant—regardless of your years of vesting service. . . .
>
> Pension payments begin the first of the month after your 65th birthday. However, if you have 10 years of vesting service (or are automatically vested as described earlier) you may choose to receive your pension as early as the first of the month after your 55th birthday. If you choose to receive your pension early, it will be reduced in the same manner as an early retirement benefit.

App. at 127a-128a.

As this provision expressly acknowledges, a Plan member (with at least ten years of service) may leave the Bank for other employment without losing retirement benefits accu-

---

[10] Although this recent revision can have no effect on John Hein's claim, it shows defendants' own discomfort with their interpretation of the provision with respect to Hein's claim. This revised SPD is dated September 15, 1995, and was therefore not before the court below. For the convenience of the Court, we have included a copy of the revised SPD in the Appendix. However, if the Court deems it appropriate, petitioners will file a formal motion to expand the record.

mulated during years of service with the Bank. However, because of the concerns regarding the length of payout noted in the preceding section of the SPD, a Plan member no longer employed by the Bank must also wait until age fifty-five to begin to receive early retirement benefits. If the Plan member has insufficient years of service, given his age at retirement, the pension will be actuarially reduced. However, if the Plan member waits until age fifty-five to collect and has exceeded the requisite thirty-five years of vesting service, as set forth in the chart above, under the terms of the Plan, the Plan member is entitled to unreduced early retirement benefits.

A parallel provision is contained in the Plan. Section VIII (6) provides:

> If a Member with vested rights attributable to contributions by the Bank under this Plan separates from the service of the Bank prior to satisfying the age requirement for early retirement benefits, as set forth in Paragraph (5)(a) of Section V hereof,[11] such Member shall, upon attaining the age requirement for receiving such early retirement benefits, be entitled to elect to have payments made to him on and after meeting such age requirements in an amount equal to the benefit he would have received at normal retirement age, actuarially reduced.

App. at 70a.

Accordingly, once a Plan member has reached the minimum age of fifty-five and has at least ten years of vesting service, that Plan member is entitled to benefits, subject to the appropriate actuarial reductions. Section VIII (6) does not detail the method of actuarial reductions for former employees. That reference is set forth in Section V(5)(b) of the Plan, which states:

---

[11] Section V (5)(a) of the Plan provides in relevant part:

Any Member . . . may retire on the first day of any calendar month in which he attains his fifty-fifth (55th) birthday and ten (10) Years of Service herein termed "Early Retirement Date." App. at 61a.

If a Member retires on his Early Retirement Date, (i) benefits accrual shall cease on his Early Retirement Date and (ii) payments of Retirement Income shall commence, at the option of the Member, either (x) on his Normal Retirement Date (in which event he will receive . . . Retirement Benefits which have accrued to his Early Retirement Date) or (y) on the first day of any month coinciding with or following his Early Retirement Date (in which event he will receive the said benefits reduced . . . [actuarially]); provided, *however, the foregoing reduction in benefits shall not be made if the Member has attained any combination of the ages and years of Vesting Service, combinations set forth below on his Actual Retirement Date*:

Age at Retirement	Minimum Years of Vesting Service at Retirement
55	35
56	34
57	33
58	32
59	31
60	30
61	29
62	20
63	20
64	20

(Emphasis Supplied). App. at 61a.

Notably, this provision refers exclusively to Plan *members* and not *employees*. Under the definition of "member" in the Plan, Section I (17) and Section IV, Hein was still a "member" when he retired at age fifty-five on December 26, 1992.[12]

[12] Section I(17) defines a Member as:

any employee who qualifies and continues to be qualified under Section IV, including in appropriate cases a qualified Employee whose service is terminated but who is or may become entitled to

The definition of "member" does not require active employment and, in fact, specifically encompasses an employee who has terminated active service, but who nonetheless is vested with pension benefits. The Plan's use of the term "member" rather than "employee" in Section V(5)(b) is inconsistent with the same provision's use of the term "Actual Retirement Date," which respondents assert is limited only to employees.

Nevertheless, McNeil denied Hein unreduced benefits by relying solely upon the reference in the Plan language to the term "Actual Retirement Date" in Section V(5)(b) and the Circuit Court confirmed McNeil's decision. *Hein v. FDIC*, 88 F.3d at 215-16, App. at 8a-9a. The Circuit Court reached this conclusion despite the provisions in the Plan expressly recognizing that employees who leave the Bank for other employment remain Plan members and retain a right to unreduced early retirement benefits under the Plan. Hein has more than complied with the Plan's requirements because he was fifty-five years old when he retired on December 31, 1992, and had more than thirty-seven years of vesting service on that date.

The Third Circuit's restrictive approach to interpreting the Bank's Plan ignored the directive that "the overwhelming evidence of the remedial purpose of ERISA must be given due weight in construing [such] provisions." *Sirkin v. Phillips Colleges, Inc.*, 779 F. Supp. 751, 754 (D.N.J. 1991) (citations omitted). Furthermore, the Third Circuit's interpretation of the Plan wrongly rejected the proposition that "ERISA plans, like contracts, are to be construed as a whole." *Id.* (quoting *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 93 (3d Cir. 1992)). "An interpretation which gives a reasonable interpretation to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable." 4 Samuel Williston & Walter H.E. Jaeger, A TREATISE ON

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receive Retirement Income, whether commencing at such termination or at a later date.

App. at 52a-53a.

THE LAW OF CONTRACTS §§ 618-619 (3d ed. 1961 and Supp. 1995) (citing *Merrill-Ruckgaber Co. v. United States*, 241 U.S. 387, 36 S. Ct. 662, 60 L. Ed. 1058 (1952), and *Stoner v. Bellows*, 196 F.2d 918 (3d Cir. 1952), *cert. denied*, 345 U.S. 938 (1953)). Accordingly, each part of the document must be considered and an interpretation will not be given to one part that will annul another part. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, __ U.S. __, 115 S. Ct. 1212, 1219, 131 L. Ed. 2d 76, __ (1995). "A document should be read to give effect to all its provisions and to render them consistent with each other." *Id.*

The language of the SPD does not require Hein to have been an active employee of the Bank on the date of his retirement from the Bank. Hein reasonably understood that the provision merely required that he wait until his fifty-fifth birthday to commence receipt of the unreduced benefits for which he had previously qualified with more than thirty-five years of service to the Bank.

However, in direct contravention of the stated policy of ERISA and the established rules for construing plans, McNeil relied on an internally inconsistent construction of the Plan provision referring to the use of the term "Actual Retirement Date." The Circuit Court incorrectly affirmed this interpretation, *Hein v. FDIC*, 88 F.3d at 215-15, App. at .

B. The denial of Petitioner's unreduced early retirement benefits was an impermissible amendment to the Bank's Plan. Therefore, the Third Circuit incorrectly determined that ERISA § 204(g) was not applicable in this case.

The district court recognized that McNeil's incorrect interpretation and application of the Plan functioned as an amendment to the Plan, invoking the protection afforded by Section 204(g) of ERISA. *Hein v. FDIC*, slip. op. at 10 n.2, 10-12. *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137 (3d Cir. 1994), expressly supports this analysis. In *Gillis*, the court began its

discussion with the plaintiffs' claim that the defendant's interpretation of the plan was an amendment and the Court never retreated from that approach, finding it "entirely plausible." *Id.* at 1144.

Although the *Gillis* court discussed plan termination with respect to the application of Section 204(g), that discussion was merely one example considered by the Court in rejecting the argument that participants could no longer accumulate years of service to grow into their early retirement benefits.[13] *Id.* at 1144. The court, after "conclud[ing] that the statutory language of § 204(g), standing alone, fails to provide any clear answer, . . . turn[ed] to other sources . . . ," specifically, an Internal Revenue Service ("I.R.S.") Revenue Ruling that dealt with employers who terminated early retirement plans, *id.* at 1145 (citing I.R.S. Rev. Rul. 85-6 1985-1 C.B. 133 (1985)), to demonstrate how a termination, *as a plan amendment*, could not be used to reduce or eliminate an employee's early retirement benefit.[14]

---

[13] The court noted:

> Defendants argue that plaintiffs do not fall within the class of persons who might satisfy the preamendment conditions (e.g. years of service with the plan sponsor) because they no longer work for Hoechst. Therefore, defendants argue, an *amendment* [not termination] of the Hoechst Retirement Plan to eliminate plaintiff's right to qualify for early retirement is not prohibited by Section 204(g)(2).

Id. (emphasis added).

[14] The regulation that is the subject of the Revenue Ruling cited in *Gillis* further supports this conclusion by stating that "protected benefits may not be eliminated by reason of transfer or any transaction amending or *having the effect of amending* a plan or plans to transfer benefits." 26 C.F.R. 1.411(d)-4 (Q & A 3) (1992), *quoted in Gillis*, 4 F.3d at 1147 (emphasis added). This indicates that Section 411(d)(6) of the Internal Revenue Code ("IRC"), which is the parallel section to Section 204(g) of ERISA, suggests that any transaction that has the effect of amending a plan would be prohibited. The IRC and sources that interpret the IRC have been expressly recognized by courts as an authoritative source for interpreting parallel or counterpart ERISA provisions. *Gillis*, 4 F.3d at 1144-45.

The *Gillis* defendants conceded that there was no plan termination, arguing that "a sale of assets where the employees no longer continue to work for the plan sponsor is materially different from a plan termination where the employees continue to work for the plan sponsor." *Id.* at 1146. Yet, the court concluded that

> *if* Hoechst had continued to employ plaintiffs after terminating its early retirement plan, plaintiffs would be able to qualify for early retirement benefits at a later date by meeting the plan's pretermination requirements. We conceive of no obvious reason why this same result should not obtain when the employees continue in their same jobs for a successor employer.

*Id.*at 1145-46 (emphasis added).

Moreover, the finding in *Gillis* that an incorrect interpretation of a plan triggers Section 204(g) is further supported by *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918 (3d Cir. 1990), *cert. denied,* 499 U.S. 920, 111 S. Ct. 1310 (1991). There, the Third Circuit Court of Appeals noted that an interpretation of a plan *could* be considered an amendment for purposes of Section 204(g): "Edgewater's blanket denial of requests for [early] retirement could be seen as an amendment to the Plan." *Id.*

Thus, the district court properly found that McNeil's interpretation and application of the Plan, denying Hein's eligibility for unreduced early retirement benefits, constituted an amendment, which was barred by Section 204(g) of ERISA.

C. The decision of the Third Circuit misapplied ERISA's limitations regarding a Plan participant's ability to grow into his benefits.

The Third Circuit incorrectly determined that Hein's service with the successor bank could not be considered in determining whether he had reached the requisite retirement age.

As Judge Stapleton noted in his concurrence and dissent in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, ERISA limits *only* a participant's ability to grow into the years of credited service requirement and not any age requirement. "[When] a plan sponsor terminates a plan in the course of a liquidation of its business in bankruptcy, for example, it need pay nothing to *a participant who has not given the sponsor sufficient service to qualify for an early retirement benefit.*" *Id.* at 1150-51 (emphasis added). However, an employee, such as Hein, who has served the requisite years, may qualify for benefits upon reaching the minimum age as set forth in the plan. In construing ERISA, Judge Stapleton noted that

> When § 1054(g) and § 1344 are read together, one finds that where a participant has qualified for an early retirement benefit prior to a termination or may thereafter qualify for that benefit by aging and giving additional service to the plan sponsor, the present value of the benefit has to be paid or set aside on termination. On the other hand, where, at the time of termination, a participant has not qualified for such a benefit and will not be able to do so in the future *because the opportunity to give service to the plan sponsor will not exist*, nothing need be paid or set aside on termination with respect to the early retirement benefit.

Id. (emphasis supplied). Judge Stapleton's subsequent opinion in *Dade* incorporates his earlier analysis set forth in the concurring opinion in *Gillis*. The *Dade* court expressly declined to overrule *Gillis*.

D. The Circuit Court wrongly concluded that Dade controls this case.

The facts in this case are entirely distinguishable from *Dade v. North American Philips Corp.*, 68 F.3d 1558 (3d Cir. 1995). In *Dade*, the Third Circuit affirmed the lower court's finding that Section 204(g) ERISA did not require North

American Philips Corporation ("Philips"), upon selling a division, but retaining the pension plan covering the employees of that division, to credit service with the purchaser when determining the eligibility of those employees for an early retirement benefit subsidy. As the Court in *Dade* expressly noted, its decision was controlled by the specific provisions of the particular employer-sponsored welfare plan then before the Court. The denial of John Hein's claims for benefits was made in extraordinary circumstances by extraordinary means, neither envisioned nor encompassed by *Dade*.

Indeed, the circumstances surrounding the seizure and sale of the assets of the Bank, culminating with McNeil's denial of Hein's claim for benefits, are substantially and significantly different than those considered in *Dade*. In *Dade*, Philips, the original employer and Plan Sponsor specifically chose to remain as the Plan Sponsor and in advance of the sale, acted according to its understanding of its obligation to its employees in the division being sold. As the Court expressly noted, the Pension Committee of the Philips Plan was authorized by the Philips Plan to exercise its discretion to amend the Philips Plan and credit employees with periods of service with a successor employer. The Philips Pension Committee did so, allowing employees credit for one year of service with the acquiring corporation, but they expressly declined to credit the more lengthy periods of service sought by the claimants in *Dade*. This extension was based on a plan provision crediting one year of service if an employee's services for Philips end by reason of layoff. However, by allowing employees with a full year of credit, any employees a few weeks away from reaching the Rule of 85 formula, as expressly adopted and interpreted by the Philips Plan Committee, had their benefits assured. Had he been an employee of Philips, Hein would be entitled to unreduced benefits.

In stark contrast, the sudden seizure of the Bank did not afford the Howard Plan Committee the opportunity to consider safeguards to protect employees from interpretations

rendered by intervenors with potentially conflicting interests. The Howard Plan also contains a provision for crediting additional service for Plan purposes should an employee's services for the Bank end by reason of layoff. The Plan recognizes "Hours of Service" for purposes of benefit entitlement to include:

> (15)(c) Each Hour of Service for which the Bank, either directly or indirectly pays an employee, or for which the employee is entitled to payment (irrespective of whether the employment relationship is terminated), for reasons other than for the performance of duties during a Plan Year, such as leave of absence, vacation, . . . layoff, jury duty or military duty. The Committee shall credit hours of service under this paragraph (c) for the Plan Year in which the Bank pays the employee, the employee becomes entitled to payment, or the payment becomes due, whichever occurs first.
>
> (1) Notwithstanding the preceding provisions of this paragraph 15(c), the Committee shall not credit: (1) more than five hundred one (501) hours of service under this paragraph . . . .

App. at 51a.[15]

Thus, had the Bank laid off John Hein immediately before the seizure of the Bank by the FDIC, he would have been entitled to a credit of up to 501 hours, well in excess of the number of hours McNeil alleged were necessary under his interpretation of the Plan.

In addition, in contrast to the Howard Plan, the Philip's Plan considered by the Court in *Dade* expressly excludes from the definition for "Period of Service," time spent working for

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[15] Moreover, this provision expressly notes that the Committee shall resolve any ambiguity with respect to the crediting of hours of service in favor of the employee. App. at 51a.

any entity that is not yet or is no longer an Employer or Affiliate. That provision, states in relevant part:

> In no event shall a Period of Service include any period of service with a corporation or other entity (a) prior to the date it became an Employer . . . or (b) after it ceases to an Employer or Affiliate except to the extent determined by law or the extent determined by the Pension Committee is its discretion exercised in a manner that does not discriminate in favor of highly paid employees.

Dade v. North Am. Philips Corp., 68 F.3d at 1561. No such express provision is contained in the Howard Plan. Given the stark differences in the plans at issue and the contrasting circumstances surrounding the corporate restructuring which occurred in these two cases, *Dade* should not control. Furthermore, the Petitioner in this case is unique in that his retirement benefits have long since been set aside. The only reason Petitioner has been denied his well deserved full benefits is because his fifty-fifth birthday occurred a few days too late.

The Circuit Court's ruling operates to undermine Congress's purpose in passing the ERISA legislation. As noted by the Court in *Dade*, " 'Congress did not intend to foreclose employers from circumscribing the availability of such optional benefits when they are being created.' " *Id.* at 1562 (citation omitted). But, just as clearly, Congress could never had intended to allow the FDIC as receiver to deprive plan participants of fully funded benefits, earned during thirty-seven years of employment. Nothing would have been added to, or subtracted from the Plan's assets, with respect to Hein during his three months of service with his successor-employer, regardless of who held the assets of the Plan. Moreover, had John Hein been laid off and collected unemployment, rather than reporting to work for the successor employer for the period at issue, McNeil could not have disputed his entitlement under the Plan.

The result reached by the Third Circuit cannot be what Congress intended by creating laws designed to protect employee's retirement benefits. The decision of the Third Circuit should not stand.

CONCLUSION

For the foregoing reasons, the petition should be granted and the case given plenary review.

Respectfully submitted,

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APPENDIX

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Filed June 28, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5641 and 95-5181

JOHN M. HEIN; MERLENE HEIN

v.

FEDERAL DEPOSIT INSURANCE CORPORATION;
BURTON MCNEIL, acting as HOWARD SAVINGS BANK
PENSION PLAN ADMINISTRATOR AND HOWARD
SAVINGS BANK PENSION PLAN;

Burton McNeil and the
Retirement Plan of The
Howard Savings Bank,

Appellants.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 93-cv-02418)

Argued December 12, 1995

Before: BECKER, ROTH and LEWIS, *Circuit Judges*

(Opinion Filed June 28, 1996)

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OPINION OF THE COURT

ROTH, *Circuit Judge*:

The question presented in this appeal is whether § 204(g) of the Employee Retirement Income Security Act ("ERISA")

allows an individual to qualify for unreduced early retirement benefits despite the fact that he does not qualify for such benefits under the plain language of the relevant company retirement plan. John Hein worked for The Howard Savings Bank ("Bank") for thirty-seven years. Shortly before Hein planned to take early retirement, the Bank was taken over by the Federal Deposit Insurance Corporation ("FDIC") as receiver in bankruptcy. On October 2, 1992, the FDIC sold the Bank's corporate assets to successor First Fidelity but retained control of the Bank's corporate pension plan ("Plan"). Appellees John and Merlene Hein contend that ERISA § 204(g) requires the corporate pension plan and its administrator to count John Hein's service with the successor corporation so that Hein can "grow into" the unreduced early retirement benefits provided by the pension plan.

The district court ruled that, pursuant to ERISA § 204(g) and the "same desk rule" enunciated in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1369 (1994), *and cert. denied*, ___ U.S. ___, 114 S. Ct. 1540, the Plan was required to credit Hein with time served with the successor corporation. Relying on our more recent and factually applicable decision in *Dade v. North American Philips Corp.*, 68 F.3d 1558 (3d Cir. 1995), we will reverse and remand this case to the district court to enter judgment for appellants.

This issue was presented to the district court on cross-motions for summary judgment. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). We have jurisdiction over the final order of the district court pursuant to 28 U.S.C. § 1291.

I

John Hein became an employee of the predecessor of The Howard Savings Bank on September 19, 1955, and soon thereafter became a participant in the Bank's employee pension benefit plan. *See* Retirement Plan of Howard Savings Bank (revised Dec. 1, 1985); App. Vol. I at 22. Section V of the Plan offered an early retirement option. App. Vol. I at 36-37. Normally, individuals exercising this

early retirement option receive benefits reduced actuarially to account for a longer anticipated payment period. Those individuals who met criteria stated in the Plan, however, were entitled to "unreduced early retirement benefits." These benefits included a subsidy from the Bank so that from the date of early retirement a retiree would receive benefit payments equivalent to those which he would have received had he postponed retirement until age sixty-five.

According to the Plan, unreduced early retirement benefits were available to any Plan member who attained

> any combination of the ages and the years of Vesting Service, combinations set forth below on his Actual Retirement Date:

Age on Actual Retirement Date	Vesting Service on Actual Retirement Date
55	35
56	34
57	33
58	32
59	31
60	30
61	29
62	20
63	20
64	20[1]

App. Vol. I at 37.

In the spring of 1992, Hein requested and received from the Plan administrator an estimate of his monthly benefit in the event he retired on January 1, 1993. On October 2, 1992, the FDIC was appointed receiver for the Bank. The

---

1. The Summary Plan Description says that an employee becomes eligible for early retirement when he reaches age 55 and completes 10 years of vesting service. Summary Plan Description of the Howard Savings Bank [hereinafter SPD]: App. Vol. I at 84, 88. In regard to unreduced early retirement benefits, the SPD provides:

FDIC issued a notice to all Bank employees informing them that their employment with the Bank was terminated. At that time, Hein was fifty-four years old with thirty-seven years of service at the Bank. That same day, the FDIC and the First Fidelity National Bank, N.A., entered into a Purchase and Assumption Agreement whereby First Fidelity agreed to assume certain assets and liabilities of The Howard Savings Bank. The Plan was not included as part of the assets and liabilities assumed by First Fidelity. The Plan remained with the FDIC, in its receivership capacity. Burton McNeil, an FDIC employee, was named Plan Administrator.

First Fidelity continued to operate all branches of The Howard Savings Bank without interruption, and Hein continued to work in the same position with First Fidelity that he held with The Howard Savings Bank before the takeover.

On December 31, 1992, Hein retired from First Fidelity. In January 1993, he requested the unreduced early retirement benefits that he claimed were due him under the Plan. In February 1993, his request was denied, and he was awarded reduced retirement payments of approximately one third the amount he would receive with the unreduced early retirement benefit.[2] McNeil denied Hein's administrative appeal, and Hein filed suit in the

---

> If you are eligible to retire early and choose to do so, your retirement benefit can begin as early as the first of the month after your last day of employment. If you choose to receive your pension early, the benefit is reduced to reflect the longer period of time over which you receive benefits from the Plan . . . .
>
> However, the Bank provides an important benefit to early retirees. This reduction does not take effect if at retirement you have a certain minimum number of years of vesting service, given your age, as shown.

App. Vol. I at 92.

This text is followed by a chart identical to the one reproduced here.

2. The Heins were awarded reduced benefits totaling $1,027.39 per month, as opposed to the $2,943.44 per month of unreduced benefits that they claim.

district court against the FDIC, the Plan, and Burton McNeil.

Hein claims[3] that he was entitled under ERISA to unreduced early retirement benefits (Count I). He also raises a promissory estoppel claim (Counts II and III), alleging that his reliance in making retirement decisions upon the Plan actuary's estimated benefit calculation and upon the Summary Plan Description ("SPD") estopped defendants from denying him unreduced early retirement benefits. Furthermore, Hein claimed that defendants breached their fiduciary duties (Counts IV, V, and VI). These claims were presented to the district court on motions and cross-motions for summary judgment.

The district court ruled for Hein on Count I of his complaint and awarded him unreduced early retirement benefits. The district court found that Hein never qualified for unreduced early retirement benefits under the express terms of the Plan because he did not reach age fifty-five while employed by the Bank. Nevertheless, the district court granted Hein unreduced early retirement benefits pursuant to ERISA § 204(g). 29 U.S.C. § 1054(g) (1994). The district court relied on our decision in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1369 (1994), *and cert. denied*, ___ U.S. ___, 114 S. Ct. 1540, which interpreted § 204(g) as allowing years of service accumulated while working for a new employer to be counted towards qualifying for early retirement benefits under the original employer's retirement plan. *Id.* at 1147-48. The district court applied this "same desk rule" and held that Hein should be permitted to "grow into" the Plan's unreduced early retirement benefits. Because Hein turned fifty-five while working in the same position at First Fidelity that he had held at the Bank, the court reasoned that he had fulfilled the Plan requirements and was entitled to unreduced early retirement benefits.

The court did not reach Hein's promissory estoppel or fiduciary duties claims and did not address any of the

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3. The claims in this case were brought by both John and Merlene Hein, but because the factual scenario refers to John Hein only, we use the singular throughout the opinion for consistency.

claims against the FDIC.[4] In a subsequent ruling, the district court awarded counsel fees and court costs totaling $70,353.83 to the Heins' attorneys, pursuant to 29 U.S.C. § 1132(g)(1). McNeil and the Plan appealed.

II

Appellants contend that the district court erred as a matter of law in its application of ERISA § 204(g) to Hein's pension claim. Our review of the district court's order granting summary judgment is plenary. *Wheeler v. Towanda Area School Dist.*, 950 F.2d 128, 129 (3d Cir. 1991); *Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 71 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). We apply the same test that the district court should have applied initially. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

We have often remarked on ERISA's broad scope and far-ranging effect. *See, e.g., Northeast Dept. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 162 (3d Cir. 1985) ("ERISA is a comprehensive benefit scheme designed to protect employees enrolled in pension and benefit plans."). Nevertheless, ERISA neither mandates the creation of pension plans nor dictates the benefits to be afforded once a plan is created. *Dade v. North American Philips Corp.*, 68 F.3d at 1561 (citing *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988); H.R.Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4670, 4677)). Only the words of the Plan itself can create an entitlement to benefits. Consequently, "we are required to enforce the Plan as written unless we can find a provision of ERISA that contains a contrary directive." *Id.* at 1562.

Our inquiry, therefore, begins with the words of the Plan itself. In relation to early retirement options, the Plan provides:

> (5)(a) Any Member, . . . may retire on the first day of any calendar month in which he attains his fifty-fifth

4. The FDIC is thus not a party to this appeal.

> (55th) birthday and ten (10) Years of Service herein termed "Early Retirement Date."
>
> (b) If a Member retires on his Early Retirement Date, . . . (ii) payments of Retirement Income shall commence, at the option of the Member, either (x) on his Normal Retirement Date (in which event he will receive the amount of Retirement Annuity Benefits and/or Retirement Benefits which have accrued to his Early Retirement Date) or (y) on the first day of any month coinciding with or following his Early Retirement Date (in which event he will receive [actuarially reduced benefits]); provided, however, *the foregoing reduction in benefits shall not be made if the Member has attained any combination of the ages and the years of Vesting Service, combinations set forth below on his Actual Retirement Date:*

Plan § V(5); App. Vol. 1 at 36-37 (emphasis added). The colon is followed by the chart of ages and years of service set forth earlier in this opinion.

The district court found that:

> Under the plain language of the Plan itself, Mr. Hein does not qualify for unreduced benefits because he did not reach one of the specific qualifying combinations of age and years of service. The table set forth in the Plan is not offered as an illustration of the qualifying combinations, but rather as an exhaustive list of those combinations. Under the language of the Plan itself, Mr. Hein did not qualify for unreduced retirement benefits.

Hein v. FDIC, No. 93-2418, slip op. at 8 (D.N.J. Sep. 13, 1994). Our analysis of the relevant Plan provisions confirms the district court's reading of the plain language of the Plan.

Subsection 5(a) provides that an individual may be eligible for early retirement benefits if he retires "on the first day of any calendar month in which he attains his fifty-fifth birthday . . . ." Hein was terminated before the first day of the month in which he would reach his fifty-fifth birthday.

Thus he was not eligible for early retirement benefits under subsection 5(a).[5]

Subsection 5(b) further provides that in order to qualify for unreduced early retirement benefits, an employee's "Actual Retirement Date" must occur after he has attained some combination of age and years of service set forth in the displayed chart. The youngest age which is stated in the chart is age fifty-five. *See* Plan, § V(5); App. Vol. 1 at 36-37. The fact that the chart runs from age fifty-five through age sixty four supports the district court's conclusion that the chart includes all those combinations of age and years of service that entitle an individual to unreduced early retirement benefits. As the district court observed, neither the Plan document nor the SPD refers to the benefit formula as the "Rule of 90" or otherwise indicates that a combination of age and years of service other than those listed in the table might suffice to entitle an individual to early retirement benefits. Because Hein did not reach age fifty-five while he was at the Bank, he could not have satisfied the conditions for the subsidy before the Bank entered receivership and Hein's employment terminated.

Furthermore, other sections of the Plan apply specifically to individuals like Hein who leave the Bank before satisfying the requirements for early retirement benefits. Plan § VIII(6), for example, provides that:

> If a Member with vested rights attributable to contributions by the Bank under this Plan *separates*

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5. The key text in McNeil's benefit denial letter reads as follows:

> At the time of the closing of the Bank and your involuntary termination, you were 54 years old and had 37 years of service. You therefore failed to satisfy the requirement for early retirement benefits under section V(5) that you leave the Bank's employment on or after your "early retirement date," which would have been December 1, 1992. You also did not satisfy the preconditions for unreduced early retirement benefits because you were age 54 at the time of your termination from the Bank. Because in each case the requirements for benefit eligibility were not met, you are not entitled to an unreduced early retirement benefit under the Plan.

Letter from Burton McNeil, Plan Administrator to John Hein (Feb. 10, 1993); App. Vol. II at 253.

> *from the service of the Bank prior to satisfying the age requirement for early retirement benefits, as set forth in Paragraph 5(a) of Section V hereof,* such Member shall, upon attaining the age requirements for receiving such early retirement benefits, be entitled to elect to have payments made to him on and after meeting such age requirements in an amount equal to the benefit he would have received at normal retirement age, *actuarially reduced.*

Plan § VIII(6); App. Vol. 1 at 45 (emphases added).[6] Thus, Hein falls outside the early retirement provisions of Plan § V and squarely within the provisions of Plan § VIII(6), which does not provide for unreduced early retirement benefits.

III

Although Hein is not entitled to unreduced early retirement benefits under the unambiguous language of the Plan, he argues that ERISA § 204(g) allows him to fulfill the Plan's age requirements during his employment in the same position with First Fidelity. ERISA § 204(g) provides that:

> (1) The accrued benefit of a participant under a plan may not be decreased by an *amendment* of the plan . . . .
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
>
> > (A) eliminating or reducing an early retirement benefit or retirement-type subsidy . . .
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. *In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy* . . . .

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6. Plan § XI also makes special provisions for individuals who were terminated "for any reason other than . . . death or retirement . . . ." Plan § XI; App. Vol. 1 at 51. This section does not provide for unreduced early retirement benefits. *See* Plan § XI(3)(a)-(b).

29 U.S.C. § 1054(g) (emphasis added). The early retirement benefits at issue in this case are a "retirement-type subsidy" within the meaning of ERISA § 204(g). *See Dade*, 68 F.3d at 1562.

Pursuant to § 204(g)(1), we must first determine whether there has been an "amendment" that reduced Hein's accrued benefits under the Plan. There is no evidence in the record that the actual text of the Plan was amended or modified in any way. This determination does not end our inquiry, however. An erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as an "amendment" for the purposes of ERISA § 204(g). Therefore, if McNeil improperly denied Hein unreduced early retirement benefits, McNeil's action could be construed as a Plan amendment, and ERISA § 204(g) would apply. *See Gillis*, 4 F.3d at 1144. The critical question is whether McNeil's interpretation of the Plan improperly denied accrued benefits to Hein.

ERISA § 204(g)(2) mandates accrual of Hein's unreduced early retirement benefits only if Hein at some point "satisfied . . . the preamendment conditions for the subsidy." Hein did not satisfy the conditions for the subsidy before he was terminated from the Bank. We must therefore consider whether Hein satisfied the Plan requirements for unreduced early retirement benefits during his employment at First Fidelity, the successor to The Howard Savings Bank.

Section V(5)(b) of the Plan provides that an individual may qualify for unreduced early retirement benefits when he "has attained any combination of the ages and years of Vesting Service . . . set forth below on his Actual Retirement Date . . . ." Thus ERISA § 204(g) would protect Hein's benefits if he had earned them by reaching age fifty-five before his "Actual Retirement Date" as defined by the Plan. In other words, if the day that Hein retired from First Fidelity, only three months after his termination from The Howard Savings Bank, could be considered to be his "Actual Retirement Date" for Plan purposes, Hein would qualify for unreduced early retirement benefits because he would have turned fifty-five before his "Actual Retirement

Date." ERISA § 204(g) would then protect his benefits from denial or amendment. However, the Plan's definition of "Actual Retirement Date" precludes such a result.

The Howard Plan defines "Actual Retirement Date" as "the date on which the service of an *Employee* is terminated by retirement." Plan, § 1; App. Vol. I at 25 (emphasis added). "Employee" is defined in the Plan as "any person who is employed by the Bank and who received compensation from the Bank . . . ." *Id.*; App. Vol. I at 26. "Bank," according to the Plan, "means The Howard Savings Bank and any affiliate or subsidiary which shall adopt this Plan for its employees with the approval of the bank by a Committee resolution." *Id.*

First Fidelity is neither an affiliate nor a subsidiary of The Howard Savings Bank. Hein could not, therefore, satisfy the requirements of the Plan after the asset sale to First Fidelity; when he reached age fifty-five he was no longer an "Employee" of the "Bank" as required by the Plan.[7] Because the Plan is written in such a way that Hein could not satisfy the conditions for the subsidy during his employment at First Fidelity, ERISA § 204(g) is inoperative; ERISA § 204(g) can protect an entitlement to benefits, but it cannot create an entitlement to benefits when no entitlement exists under the terms of the Plan.

Nevertheless, the district court ruled that § 204(g) mandates the extension of unreduced early retirement benefits to Hein in this case. According to the court, ERISA § 204(g) and *Gillis* entitled Hein to count his post-termination time of service with First Fidelity with his time of service at the Bank under the "same desk rule." *Hein v. FDIC*, slip op. at 9-13. We conclude, however, that under our more recent holding in *Dade*, a case more closely analogous to the facts of the case before us, the district court's ruling is error.[8]

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7. In fact, Hein technically had no "Actual Retirement Date" according to the Plan, because he was not a Bank Employee when he retired.

8. The *Dade* case had not been decided at the time the district court rendered its decision and the district court could not have been aware at the time of the limitations that *Dade* would place on *Gillis*.

The plaintiffs in *Gillis* were former employees of Hoechst Celanese Corp. who continued to work in their same jobs after the division in which they worked was sold by Hoechst to American Mirrex Corporation. *Gillis*, 4 F.3d at 1140. Neither plaintiff satisfied the requirements for early retirement benefits at the time the division was sold. The issue was whether or not ERISA §§ 208 and 204(g) would allow the plaintiffs to "grow into" their early retirement benefits by aggregating the time that they worked at American Mirrex and the time that they worked at Hoechst. *Id.* at 1143. We concluded that ERISA § 204(g) did not definitively answer this question, and we examined analogous I.R.S. authority to determine when an individual is "separated from service." We concluded that the employees could "continue to accumulate years of service while working for American Mirrex—the successor employer —to be counted towards qualifying for early retirement benefits." *Id.* at 1147-48 (relying in part on *Hollingshead v. Burford Equip. Co.*, 809 F. Supp. 906 (M.D. Ala. 1992)).

The district court applied *Gillis*'s "same desk rule" to Hein. The court ruled that because Hein was working in the same position for successor employer First Fidelity, ERISA § 204(g) allowed him to qualify for unreduced early retirement benefits.

Our more recent decision in *Dade* distinguished *Gillis* and reached the opposite result. *Dade* involved the sale of the assets of Philips' Magnavox Electronic Systems division to MESC Electronics Systems, Inc. ("MESCESI"). After the sale, plaintiffs, who were plan members at Magnavox, continued to work for MESCESI in the same positions in which they were employed by Magnavox at the time of the asset sale. *Dade*, 68 F.3d at 1560. Plaintiff Budde had attained the necessary years of service to qualify for unreduced early retirement benefits while he was at Magnavox, but like Hein he had not yet attained the requisite qualifying age of fifty-five. Plaintiffs sought to invoke § 204(g) to add their years of service at MESCESI to their service at Magnavox in order to qualify for unreduced early retirement benefits under the plan.[9] *Id.* at 1561.

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9. Philips did amend its plan so that: "Magnavox employees continuing with MESCESI would be entitled to credit for up to one year of additional

We declined to take plaintiffs' years of service with MESCESI into account when determining whether or not they qualified for unreduced early retirement benefits under the Magnavox plan:

> Section 204(g) is not applicable under the facts of this case . . . Philips' stated position was nothing more than an accurate recounting of the Plan's terms. The denial resulted from the fact that plaintiffs could not satisfy the preamendment, pre-sale conditions for the Rule of 85 retirement-type subsidy as originally written.

Id. at 1562.

Dade controls this case. Like the plaintiffs in *Dade*, Hein simply did not satisfy the pre-amendment, pre-transfer conditions for unreduced early retirement benefits. As we noted in *Dade*:

> [§ 204(g)] does not override the conditions originally imposed by the Plan which defined the early retirement benefits when they were created . . . . '[T]he fact that [amendments reducing early retirement benefits] will now be 'treated as reducing accrued benefits' does not mean that Congress intends to foreclose employers from circumscribing the availability of such optional benefits when they are being created.'

Id. (quoting *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1527 (3d Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989)). It was one of the conditions originally imposed by the Plan that Hein reach age fifty-five while employed at the Bank in order to qualify for unreduced early retirement benefits. Had Hein met this criterion, ERISA § 204(g) would have protected his benefit from termination. But Hein did not satisfy the Plan

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service with MESCESI towards the Philips Plan's Rule of 85 requirements." *Dade*, slip op. at 4. Thus an individual in Hein's position would have received a year of credit for his service with the successor employer. Even with this additional year, Budde did not qualify under the Philips plan. If the FDIC had allowed such an exception in this case, Hein would have been able to count his three months service with First Fidelity toward Plan requirements for unreduced early retirement benefits. The FDIC took no such discretionary action.

requirement, and we cannot read ERISA to change the terms of the Plan and vest Hein with a benefit for which he never qualified.

We also note that this case is factually more similar to *Dade* than it is to *Gillis*. First, unlike *Dade* and this case, *Gillis* involved a plan "spin-off" whereby "the original plan sponsor transferred all of the plan's liabilities and assets to the purchaser." *Id.* at 1563. We held in *Gillis* that "the combined effect of §§ 208 and 204(g) in the context of a plan spin-off . . . was to require the transfer of an amount of assets that would include sufficient funding for the early retirement benefits for those who would qualify after the transfer by service to the new employer." *Id. Dade*, by contrast, did not involve a transfer of the plan assets to the purchaser, and therefore we held that:

> Section 208 is not relevant here because this case does not involve a plan spin-off. Section 204(g) is not applicable here because this case does not involve anything that can fairly be considered a plan amendment eliminating or reducing an early retirement benefit . . . . The holding in *Gillis* is, accordingly, inapposite here."

Id.; *see also Hunger v. AB*, 12 F.3d 118 (8th Cir. 1993) (reaching result consistent with *Dade* on similar facts), *cert. denied*, 114 S. Ct. 2676 (1994). As in *Dade*, this case does not involve a transfer of Plan assets to the successor corporation. McNeil's accurate interpretation of the Plan provisions, furthermore, cannot be considered an amendment of the Plan. As in *Dade*, neither ERISA § 208 nor ERISA § 204(g) applies to the facts of this case.

Second, this case resembles *Dade* in that there is no evidence that the purchasing company made representations about benefits. The purchaser in *Gillis* agreed "to provide all of the same early retirement benefits as the previous plan. There was no dispute about whether plaintiffs, following the spin-off, would be entitled to credit for service with the new employer. They would be." *Dade*, 68 F.3d at 1563 (citing *Gillis*, 4 F.3d at 1149 (Alito, J. concurring)). In this case, as in *Dade*, neither the new employer nor the Plan administrator made any such

promise to Bank employees. There was no question that Hein was bound by the terms of the Plan as written. *Dade* thus applies.

Hein concentrates on other facts in an attempt to distinguish this case from *Dade*, but the factual distinctions that he raises are either illusory or irrelevant. First, Hein argues that he qualified for unreduced early retirement benefits before age fifty-five and that the Plan merely prevented him from *collecting* those benefits before age fifty-five. He argues that he was entitled to unreduced early retirement benefits under the Plan because he reached a combination of age and years of service totaling ninety years before his termination. The district court rejected this argument and arguments involving an earlier amendment to the Plan intended to support this contention. *Hein v. FDIC*, slip op. at 8. As the district court found, the Plan provided that Hein had to reach age fifty-five while he was employed with the Bank in order to qualify for unreduced early retirement benefits. *See* discussion *supra*. Hein did not satisfy this condition.

Second, Hein notes that in *Dade*, the Pension Committee of the Philips Plan, "exercise[d] its discretion to amend the Philips Plan and credit employees with periods of service with a successor employer." The Philips Committee allowed former employees one year of service with their new employer toward satisfying plan requirements. *See supra* note 10. Hein argues that the sudden seizure of the Howard Savings Bank did not afford the Howard Plan Committee the opportunity to consider safeguards to protect employees from interpretations of the Plan which might be rendered by intervenors with potentially conflicting interests. Hein contends that given the opportunity, the Bank's Plan Committee might well have chosen to amend the Plan to allow him to collect unreduced early retirement benefits. He argues that unduly restrictive and incorrect interpretation of the Howard Plan by McNeil, without the benefit of interpretation by the Plan Committee or an appropriate replacement, distinguishes this case from the holding in *Dade*.

The substance of this claim appears to be that McNeil and the FDIC improperly substituted their interpretation of

the Plan for that of the Plan Committee, in derogation of the procedures specified in the Plan. The Plan expressly provides that it is to be administered by a Committee comprised of five individuals appointed by the Chairman of the Board of the Bank. The Committee is empowered by the Plan to "interpret the Plan and to decide any and all matters arising thereunder or in connection with the administration of the Plan, including, but not limited to, the determination of any Employee's eligibility and the size and form of a Participant's benefits . . . ." Plan, § XII; App. Vol. I at 54. After the FDIC was appointed receiver for the Plan, McNeil, rather than a Plan Committee, was designated to hear Hein's appeal for unreduced benefits. Hein argues that McNeil inappropriately supplied terms and conditions not in the Plan document.

Citing *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S. Ct. 1223, 1229 (1995), Hein notes that ERISA dictates enforcement of the Plan as written, including the means of administration adopted by the Plan. He cites no specific authority, however, that directly supports his contention that the FDIC's appointment of McNeil as sole administrator was inappropriate. We have likewise found no case directly on point. *Hennessy v. Federal Deposit Insurance Corp.* is, however, analytically similar to this case. 58 F.3d 908 (3d Cir. 1995), *cert. dismissed sub nom., Hanna v. F.D.I.C.*, ___ U.S. ___, 116 S. Ct. 688 (1995), *and cert. denied*, ___ U.S. ___, 116 S. Ct. 1318 (1996), *and cert. denied sub nom., Hanna v. F.D.I.C.*, ___ U.S. ___, 116 S. Ct. 1318 (1996). In *Hennessy*, former employees of an insolvent bank ("Meritor") sued the FDIC as receiver for the bank for, *inter alia*, improper termination of benefits. The question before us was "what 'procedure' the FDIC must follow when it is appointed receiver for Meritor and it terminates an employee welfare benefit plan . . . ." *Id.* at 922.

Relying on *Curtis-Wright*, we construed the plan to reserve to Meritor's board of directors the right to terminate the corporate benefit policy. *Id.* Because the bank was already in receivership, it was impractical to expect the FDIC to recreate the plan's procedures for benefit determinations. We concluded that:

> under such circumstances, it would make little sense to require the FDIC to follow *Meritor's* procedure for terminating these plans (i.e., calling a meeting of the Board of Directors of *Meritor* or taking other corporate action). While the appropriate analog within the FDIC to Meritor's Board of Directors is not immediately apparent, *it is clear that an official receiver has great discretion in taking action that would previously have been handled through the normal methods of corporate governance. Thus, the receiver alone may act in ways that might otherwise require Board action . . . . [W]e decline to require further investigation into the methods by which the FDIC makes its decisions.*

Id. at 922-23 (emphasis added).

We likewise decline the invitation to investigate the FDIC's decision-making processes. As in *Hennessy*, it would make little sense at this stage to require the FDIC to follow the Bank's procedure for resolving Plan discrepancies (i.e., calling a meeting of the five members of the Plan Committee to interpret Hein's benefits). We will permit the FDIC the same wide discretion in handling matters previously handled through the normal methods of corporate governance that we permitted in *Hennessy*. ERISA does not require that the FDIC determine precise analogs to prior corporate procedures in order to administer the Plan as written. To force it to do so would be impractical. Hein cites no authority mandating such extraordinary measures.

Third, Hein argues that this case is materially different from *Dade* because in this case all necessary contributions to fund Hein's unreduced retirement benefit had been made by his employer and the employer's contributions had ceased six years before the FDIC was appointed receiver. Hein contends that Congress did not intend to allow intervenors to deprive plan participants of fully funded benefits. According to Hein, estimates of the Howard Plan actuary confirm that Hein had reached the maximum number of years of credited service and that the Plan had received all contributions to be made on his behalf.

This argument misses the mark. The issue is whether Hein was *entitled* to benefits, not whether funding for the

benefits that he claims had already been set aside. Congress intended ERISA § 204(g) to protect retirement-type benefits under certain circumstances. Funding, however, is irrelevant to entitlement. Nothing in § 204(g) establishes the Plan's funding level as a test for accrual, and we will not take it into account here. The argument that Hein's unreduced early retirement benefit was fully funded does not bear on his entitlement to unreduced benefits.

None of these arguments distinguish this case from *Dade* in a meaningful way. Because Hein was not entitled to unreduced early retirement benefits under the plain language of the Plan and because *Dade* makes clear that we do not apply a "same desk rule" under the circumstances presented here, ERISA § 204(g) does not mandate that Hein be credited with post-termination service and awarded unreduced early retirement benefits. We will reverse the judgment of the district court as to Count I and remand with instructions to enter an order in accordance with this opinion. We will also vacate and remand the district court's order granting attorneys' fees to Appellees.

IV

Our holding with regard to Count I of Hein's complaint has ramifications for his other claims as well. Appellants argue that a reversal on Count I obviates the need for a remand of Hein's other claims because as a matter of law those claims cannot withstand an adverse ruling on Count I. Although the district court did not reach Counts II through VI, the issues were presented to that court. Both parties have adequately briefed the issue of whether or not a remand is necessary. To the extent that we can decide these issues as a matter of law without further factual development, we serve the interests of judicial economy as well as the interests of the parties in avoiding unnecessary re-litigation. Put simply, the legal issues are clearly presented and ripe for review.

Because we consider Counts II through VI without the benefit of findings of fact from the district court, we will

dismiss these claims only if there is no genuine issue of material fact and appellants are entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). We consider the facts as they have been determined pursuant to our adjudication of Count I and give Hein the benefit of any relevant inferences from these facts. *See Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

Counts II and III of Hein's amended complaint allege that the defendants in this case are equitably estopped from denying Hein unreduced early retirement benefits. According to the complaint, Hein reasonably relied upon the SPD and a report provided to him by a Plan actuary indicating his entitlement to unreduced early retirement benefits. Because Hein relied upon these documents in making retirement plans and investments, he argues that appellants are equitably estopped from denying him unreduced early retirement benefits.

Given our ruling on Count I and the district court record, Hein's claim for equitable estoppel must fail. A judgment for Hein on his equitable estoppel claim would require us to find (i) a material misrepresentation, (ii) reasonable reliance upon the misrepresentation, and (iii) damage resulting from the misrepresentation. *Heckler v. Community Health Serv.*, 467 U.S. 51, 59 (1984); *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991), *cert. denied*, 501 U.S. 1232 (1991); *Pane v. RCA Corp.*, 868 F.2d 631, 638 (3d Cir. 1989). A party's reliance on a misrepresentation "must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler*, 467 U.S. at 59 (citing *Wilber National Bank v. United States*, 294 U.S. 120, 124-25 (1935)).

Hein claims that he satisfies all three elements for equitable estoppel. First, he identifies an alleged misrepresentation. Hein claims that in April 1992, he received a written report from Towers Perrin, "the Bank's agent and actuary," indicating that the Bank had made all necessary contributions for Hein's unreduced early retirement benefits. Hein next claims that in reliance on the Bank's representation he entered into a contract for

substantial renovations to a home in the Adirondacks, where he and his wife plan to spend their retirement.

The plain language of the Plan and the SPD preclude Hein's claim. We have already discussed at length the fact that the words of the Plan do not bestow upon Hein a right to unreduced early retirement benefits. The same table setting forth qualifying combinations of ages and years of service that appears in the Plan also appears in the SPD, and nowhere does the SPD refer to the benefit formula as a "Rule of 90." The provisions of the SPD, like the provisions of the Plan itself, present the age requirement unambiguously. *See* discussion *supra*. Hein cannot, therefore, base his estoppel claim on the language of the SPD.

In the face of such clear evidence that Hein did not qualify for unreduced early retirement benefits, the letter from Towers Perrin upon which Hein purports to have relied is insufficient support for his estoppel claim. As we ruled in *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, "a participant's reliance on employer representations regarding benefits may never be 'reasonable' where the participant is in possession of a written document notifying him of the conditional nature of such benefits." 58 F.3d 896, 908 (3d Cir. 1995) (citing *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir. 1993); *Alday v. Container Corp. of America*, 906 F.2d 660, 666 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991)). In *Unisys*, our finding that a reservation of rights clause contained in the plan was unambiguous "undercut[] the reasonableness of any detrimental reliance by the retirees." *Id.* Because of the clear language of the plan in that case, we dismissed the estoppel claim on summary judgment, despite the fact that the company had "engaged in a 'systematic campaign of confusion' which led employees to believe that their benefits were to continue for life." *Id.* at 907 n.20.

The case for equitable estoppel here is even less compelling than the plaintiffs' case in *Unisys*. Hein, like the *Unisys* retirees, was in possession of the written Plan document and SPD notifying him of the conditional nature of his benefits. There is no evidence or allegation of a

"systematic campaign of confusion" by the Bank. There was, at most, a possibly misleading letter from the benefits department calculating Hein's likely future benefits *if* he retired from the Bank on January 1, 1993. The sale of the Bank's assets on October 2, 1992, and Hein's termination on that same day prevented his retirement from the Bank on or after that date. Under *Unisys*, Hein could not reasonably rely on such a conditional letter to establish a vested right to early retirement benefits, especially in the face of a written Plan document that clearly set out the requirements to qualify for benefits.

In light of our ruling on Count I and our holding in *Unisys*, we will remand the case to the district court with instructions to dismiss Hein's complaint with respect to Counts II and III.

Counts IV, V, and VI of Hein's amended complaint allege that Hein is entitled to monetary relief to compensate him for breach of fiduciary duty by McNeil and the FDIC. Hein brings these claims pursuant to the enforcement section of ERISA, § 502(a).

Appellants seek dismissal of Hein's fiduciary duties claims because they allege that Hein improperly attempts to use ERISA § 409(a), 29 U.S.C. § 1109(a), to collect damages in his individual capacity. The text of § 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses *to the plan* resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of *assets of the plan* by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary
>
> . . . .

29 U.S.C. § 1109(a) (emphases added). The Supreme Court has held that Congress intended any extracontractual damages sought by a plan participant pursuant to § 409 to inure to the plan itself, and *not* to an individual plan beneficiary. *Massachusetts Mutual Life Ins. Co. v. Russell*,

473 U.S. 134, 140-44 (1985); *see also Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) ("Because plaintiffs here seek to recover benefits allegedly owed to them in their individual capacities, their action is plainly not authorized by either § 409 or § 502(a)(2)"). The few exceptions to this doctrine have been narrow and limited to their facts. *See, e.g., Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1414-15 (9th Cir. 1988) (imposing constructive trust in favor of beneficiaries because it is "the only remedy, under the facts of this case, that can redress the abuse of this plan's assets . . . ."). Thus, to the extent that Hein relies on § 409 to support his claim for recovery of damages, his cause of action for breach of fiduciary duty is invalid.

Hein contends that the reference to ERISA § 409(a) is not fatal. He notes that his complaint expressly states in paragraph 7 that it is brought pursuant to § 502(a), 29 U.S.C. § 1132(a), and that it "avers a breach of fiduciary duty utilizing the statutory language of Section 404(a)(1)(B) and common law fiduciary duties. Pursuant to *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), we can award claimants relief in their individual capacities when their claim arises under ERISA § 404. Such relief is authorized as "other appropriate equitable relief" under ERISA § 502(a)(3)(B), 29 U.S.C. § 1132 (a)(3)(B). *Varity Corp. v. Howe*, ___ U.S. ___, 116 S. Ct. 1065, 1075-79 (1996); *Bixler*, 12 F.3d at 1293-94, 1299; *In re Unisys Corp.*, 58 F.3d at 1268-69 (citing *Anweiler v. Amer. Elec. Power Serv. Corp.*, 3 F.3d 986, 993 (7th Cir. 1993); *see* Appellants' Reply Brief at 17 (conceding that "*Bixler* would permit individual recovery for a breach of fiduciary duty under certain circumstances . . . .").

Although a § 404 recovery is theoretically available, Hein never mentions § 404 in his amended complaint. Given the language of the complaint, however, this is not a serious impediment to his claim. Counts V and VI in fact closely track the language of § 404, *see* 29 U.S.C. § 1104, and appellants had ample opportunity to respond to these arguments in their reply brief. Construing the pleading liberally, we find that Hein's claims for breach of fiduciary duty were properly brought before the district court

pursuant to § 404. Fed.R.Civ.P. 8(f) (mandating construction of pleadings to do "substantial justice"); *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200 (1938) (noting that pleadings should not raise barriers to fair and just settlements); *Monal Constr. Co. v. Brookside Ltd. Partnership*, 539 F. Supp. 478, 480 (W.D. Pa. 1982) (considering removal action under proper Code section despite typographical error indicating different section).

The question before us then is whether Hein's claims for damages for breach of fiduciary duty can survive as a matter of law, assuming that they were brought under ERISA §§ 404 and 502. Section 404 states in part that:

> (a) (1) [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (I) providing benefits to participants and their beneficiaries; and
>
> (II) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> . . . .

29 U.S.C. § 1104.[10]

Appellants assert that Hein's § 404 claim fails on two grounds. First, appellants argue that § 502(a)(3) authorizes only equitable relief and that the money damages sought by Hein are not available under this section. *Id.* at 18 (citing

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10. Appellants do not contest that McNeil is a Plan fiduciary as defined by ERISA. ERISA defines a fiduciary in part as a person who "exercises any discretionary authority or discretionary control respecting management" of a plan or who has "authority or control respecting management or disposition of its assets" or who "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A)(i)-(iii).

Mertens v. Hewitt Assoc., 508 U.S. 248 (1993)). Second, they contend that Hein has failed to establish any causal link between the alleged fiduciary breach and the damages he seeks to recover. Appellants maintain that if Hein's underlying claim for unreduced early retirement benefits was correctly denied because he was not entitled to such benefits under the terms of the Plan, he cannot recover these additional benefits by showing that assets of the Plan were improperly invested.

We agree that monetary damages generally are not available pursuant to § 502(a)(3). This section provides that a civil action may be brought:

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) *to obtain other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(a)(3) (emphasis added). Because subsection (A) of § 502(a)(3) is expressly limited to injunctive relief, Hein's only hope to secure monetary relief is under subsection (B). The Supreme Court foreclosed this option in *Mertens*. After reviewing the history and meaning of "equitable relief" and the use of those words in the context of ERISA, the Court concluded that "appropriate equitable relief" in subsection (B) does not include monetary damages, but rather refers to remedies traditionally viewed as equitable, such as injunction or restitution. *Mertens*, 508 U.S. at 256-63. Because Hein requests monetary damages under ERISA § 502(a)(3) and such damages are legal damages not available pursuant to *Mertens*, we will instruct the district court to dismiss all three of Hein's fiduciary duties claims for monetary damages (Counts IV, V, and VI).[11]

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11. *Mertens* does not necessarily bar all forms of monetary damages. The Eighth Circuit Court of Appeals has characterized some forms of monetary relief sought pursuant to ERISA § 502(a)(3) as restitution, so that such relief avoids the bar to monetary damages erected by *Mertens*. *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994), *aff'd*, 116 S. Ct.

Given our holding on Count I, we must dismiss all three of Hein's fiduciary duties claims for another reason. Even assuming that all of Hein's allegations are true and that McNeil and the FDIC breached their fiduciary duties to the Plan, Hein cannot claim benefits to which he is not entitled. Because Hein was not entitled to the benefits in the first place, there is no causal link between the alleged breach of fiduciary duty by McNeil and the FDIC and the denial of benefits to Hein.

Hein attempts to counter this conclusion by finding a causal link between the denial of unreduced benefits and the Plan's underfunding. By McNeil's own admission, the decision to deny Hein's benefits was influenced by the fact that the Plan was underfunded. Letter from Burton McNeil, Plan Administrator to Anthony P. Terracciano, Chairman, President and CEO, First Fidelity (May 20, 1993); App. Vol. II at 282. Hein argues that the Plan's underfunding was caused by McNeil's failure to adequately supervise fund assets and that McNeil's decision to take the underfunding into consideration when denying Hein's appeal was a breach of fiduciary duty. Thus, Hein alleges, there is a link between McNeil's alleged breach of fiduciary duty and the denial of unreduced benefits.

The important question, however, is not whether McNeil would have granted Hein unreduced benefits if the Plan had been fully funded, but whether Hein is legally entitled to recover damages. Because Hein was not entitled to unreduced benefits under the terms of the Plan, he cannot claim, when he is denied those benefits, that he is entitled to damages because Plan funds were mismanaged.

1065 (1996). The Eighth Circuit restored to retirees benefits to which they were entitled and of which they had been deprived due to misrepresentations by management. *Id.* While we need not decide whether to follow the Eighth Circuit, we do observe that, as noted, *supra*, Hein was not entitled to any benefits under the terms of the Plan, and there was no evidence of deceit by management in this case. Therefore, restitution would be inappropriate.

In any event, Hein has made no attempt to characterize as restitution the monetary damages he seeks.

Moreover, even if we were to assume that McNeil mismanaged the Plan and that but for this mismanagement the Plan would have made an exception and granted Hein unreduced benefits, even though he was not entitled to them, we do not establish that Hein has a legal right to the funds or a legal injury stemming from their denial. Such discretionary decisions, to grant benefits that are not otherwise owed, are not mandated by ERISA. ERISA neither creates pension plans nor "dictate[s] the benefits to be afforded once a decision is made to create one." *Dade*, slip op. at 6 (citing *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988)). We must abide by this fundamental principle.

Given our holding on Count I, Hein cannot prove that he suffered cognizable injury from the alleged breach of fiduciary duty or that McNeil breached a duty by failing to "provid[e] benefits to participants and their beneficiaries . . . ." 29 U.S.C. § 1104(a)(1)(A)(I). McNeil was merely adhering to the express terms of the Plan document by refusing to make an exception.

We will dismiss Hein's fiduciary duties claims as a matter of law. Monetary damages are not available under ERISA § 404. Moreover, regardless of the adequacy of the Plan's administration, Hein was not entitled to the funds. These claims must fail.

V.

We will reverse the judgment of the district court on Count I and vacate the order granting attorneys' fees to appellees. In addition, we have determined that Counts II through VI of the Heins' amended complaint must be dismissed. We will remand the case to the district court with instructions to grant judgment to appellants on all counts.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 93-2418 (HLS)
Filed: September 13, 1994

JOHN M. HEIN and MERLENE HEIN,

Plaintiffs,

—v.—

FEDERAL DEPOSIT INSURANCE CORP., et al.,

Defendants.

OPINION

Sarokin, District Judge:

Before the court are several motions: defendants Burton McNeil and The Retirement Plan of the Howard Savings Bank's motion for summary judgment; plaintiffs the Heins's cross-motion for summary judgment; and defendant Federal Deposit Insurance Corporation's motion for summary judgment.

Background

The following facts are not in dispute. Plaintiff John Hein was born on December 26, 1937, and became an employee of the Howard Savings Bank (the "Bank") or its predecessor on

September 19, 1955 and soon thereafter became a participant in the Bank's employee pension benefit plan (the "Plan").

The Plan document provided for unreduced early retirement benefits for employees who met certain specifications. Section V(5)(b) of the Plan provided:

> If a Member retires on his Early Retirement Date, (i) benefit accruals shall cease on his Early Retirement Date, and (ii) payments of Retirement Income shall commence, at the option of the Member, either (x) on his Normal Retirement Date (in which event he will receive the amount of Retirement Annuity Benefits and/or Retirement Benefits which have accrued to his Early Retirement Date) or (y) on the first day of any month coinciding with or following his Early Retirement Date (in which even he will receive the said benefits reduced by 1/2 of 1% for each unattained month after the date his benefits commence prior to his 60th birthday and prior to his Normal Retirement date); provided, however, the foregoing reduction in benefits shall not be made if the Member has attained any combination of the ages and years of Vesting Service, combinations set forth on his Actual Retirement Date:

Age on Actual Retirement Date	Vesting Service on Actual Retirement Date
55	35
56	34
57	33
58	32
59	31
60	30
61	29
62	20
63	20
64	20

Hein Dep., Ex. D-1 at 13.

The Summary Plan Description ("SPD") describes the eligibility requirements for unreduced early retirement benefits as follows:

> You become eligible for early retirement when you reach age 55 and complete 10 years of vesting service.
>
> If you are eligible to retire early and choose to do so, your retirement benefit can begin as early as the first of the month after your last day of employment. If you choose to receive your pension early, the benefit is reduced to reflect the longer period of time over which you receive benefits from the Plan.
>
> However, the Bank provides an important benefit to early retirees. This reduction does not take effect if at retirement you have a certain minimum number of years of vesting service, given your age, as shown.

Hein Dep., Ex. D-2, at 3, 7-8. These sections of the SPD are followed by a chart identical to the one previously reproduced.

In the spring of 1992, Mr. Hein contacted the administrator of the Bank's Plan to request an estimate of his monthly benefit in the event he retired on January 1, 1993. Based on the estimate he received, Mr. and Mrs. Hein made plans for their retirement, and entered into a contract for revisions on a house in the Adirondack mountains where they hoped to live.

On October 2, 1992, the Federal Deposit Insurance Corporation ("FDIC") was appointed Receiver for the Bank. The FDIC immediately issued a notice to all Bank employees informing them that their employment with the Bank had been terminated. In addition, that same day, the FDIC acting as receiver ("FDIC-Receiver"), the FDIC acting in its corporate capacity ("FDIC-Corporate"), and First Fidelity Bank N.A. ("First Fidelity") entered into a Purchase and Assumption Agreement ("P & A Agreement"). Under the P & A Agreement, First Fidelity agreed to assume certain assets and liabilities of the Howard Savings Bank. The Plan was not included as part of the assets and liabilities assumed by First Fidelity. Instead, the Plan was relegated to the FDIC in its receivership capacity, and Burton McNeil ("McNeil"), an FDIC employee, was named as Plan Administrator.

First Fidelity continued to operate all branches of the Bank without interruption. Mr. Hein continued working in the same position he had held before the takeover.

Mr. Hein retired from First Fidelity on December 31, 1992. In January 1993, he requested the unreduced early retirement benefits he claims are due him under the Plan. In February, his request was denied; he was awarded reduced retirement benefits, amounting to about a third of what he expected. The Plan's administrator McNeil denied Mr. Hein's appeal of his decision, and Mr. Hein filed the present action in June of 1993.

In November of 1993, this court denied defendants McNeil and The Retirement Plan of the Howard Savings Bank's motion for summary judgment because there were genuine issues of material fact in dispute.

On April 21, 1994, the Heins amended their Complaint to add Counts Five and Six. In Count One of the Amended Complaint, the Heins claim under the Employee Retirement Income Security Act's ("ERISA") civil enforcement provision, 29 U.S.C. § 1132(a)(1)(B), seeking a declaration that the Heins are entitled to unreduced early retirement benefits, attorney's fee, and costs of suit. In Counts Two and Three, the Heins claim that they relied upon the Plan actuary's estimated benefit calculation and upon the SPD in making retirement plans, and that defendants are equitably estopped from denying them unreduced retirement benefits. In Counts Four, Five, and Six, the Heins claim that defendants have breached their fiduciary duties.

Defendants McNeil and The Retirement Plan of the Howard Savings Bank move for summary judgment. Plaintiffs the Heins have filed a cross-motion for summary judgment against McNeil and The Retirement Plan of the Howard Savings Bank.

Defendant FDIC moves for summary judgment, seeking to dismiss the Complaint against the FDIC in both its corporate and receiver capacities.

Discussion

This court can only grant summary judgment if there are no issues of material fact and, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 84 (3d Cir. 1987). Notwithstanding this presumption in favor of the non-moving party, in opposing a motion for summary judgment, a party

> must do more than simply show that there is some metaphysical doubt as to the material facts . . . . In the language of the Rule, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial.

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Whether or not the factual issues plaintiff claims require further discovery are material to the resolution of the case will depend upon the court's analysis of the applicable law.

In its opinion, the court will address plaintiffs and defendants McNeil and The Retirement Plan of the Howard Savings Bank's cross-motions for summary judgment. Because, for the following reasons, plaintiffs are entitled to relief under Count One of the Amended Complaint against McNeil and The Retirement Plan of the Howard Savings Bank, the court need not address plaintiffs' claims against the FDIC.

I. Entitlement to Unreduced Early Retirement Benefits Under the Express Language of the Plan

Defendants McNeil and The Retirement Plan of the Howard Savings Bank argue that because Mr. Hein was terminated from the Bank prior to his fifty-fifth birthday, he never qualified for unreduced early retirement benefits under the express terms of the Plan. Defs.' Br. at 16.[1] As set out above,

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[1] The parties' briefs are abbreviated as follows: McNeil and The Retirement Plan of the Howard Savings Bank's brief in support of its motion for summary judgment ("Defs.' Br."); the Heins's brief in oppo-

the Plan specifies that in order to qualify for unreduced early retirement benefits, a participant must retire on or after the first day of the month in which the participant turns fifty-five and has completed ten years of service, and on his actual retirement date must have attained one of the combinations of age and years of service set out in the chart above. Mr. Hein did not retire from the Bank on his "early retirement date," (December 1, 1992) because he had already been terminated from the Bank on October 2, 1992; and, Hein was fifty-four, not fifty-five, when he was terminated on October 2, 1992.

The Heins argue that the Plan did not actually require that Mr. Hein reach age fifty-five to qualify. Pls.' Br. at 15. They claim that, under the language of the Plan in Section V, ¶5(b), he is entitled to unreduced benefits because he satisfied the requirement of attaining a combination of age and years of service that added to 90 (the "Rule of 90"). *Id.* Plaintiff attained the combination of 90 on December 26, 1991 when he turned 54. *Id.*

Defendants point out, however, that the plain language of the Plan document and the SPD does not provide for unreduced early retirement benefits upon *any* combination of age and years of service equaling 90, but rather specifies the combinations that qualify in the table in Section V(5)(b)(ii). Defs.' Br. at 13-14. The first combination listed specifies age 55. The "Rule of 90," defendants contend, is directly inconsistent with the Plan, and neither the Plan document nor the SPD refers to the benefit formula as the "Rule of 90." Defs.' Br. at 13, n.3. Because Mr. Hein was terminated before he reached age 55, defendants argue, he never qualified under the express terms of the Plan. Defs.' Br. at 14.

The Heins argue that the "Rule of 90" describes the actual eligibility requirements for unreduced benefits. They explain

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sition to the defendants' motion for summary judgment and in support of their cross-motion for summary judgment ("Pls.' Br."); McNeil and The Retirement Plan of the Howard Savings Bank's brief in opposition to plaintiffs' cross-motion and in further support of their motion for summary judgment ("Defs.' Reply Br."); the Heins's letter brief responding to defendants' brief in opposition to their cross-motion ("Pls.' Reply Br.").

that the chart begins with age 55 because several years ago the Plan was amended to require that employees be at least 21 years old before joining the Plan. Pls.' Br. at 17. Mr. Hein joined the Plan before the amendment, at age 18, and is therefore in the possibly unique position of having attained the triggering "90" combination before his fifty-fifth birthday. *Id.* Mr. Hein argues that he understood the amendment to mean he would not *receive* the unreduced retirement benefits until after his fifty-fifth birthday, although he *qualified* for the benefit a year earlier. *Id.*

Unfortunately, the Heins do not provide supporting documentation to verify either the intent of the amendment or the pre-amendment qualifications necessary to receive unreduced benefits. Under the plain language of the Plan itself, Mr. Hein does not qualify for unreduced benefits because he did not reach one of the specific qualifying combinations of age and years of service. The table set forth in the Plan is not offered as an illustration of qualifying combinations, but rather as an exhaustive list of those combinations. Under the language of the Plan itself, Mr. Hein did not qualify for unreduced retirement benefits.

II. Entitlement to Unreduced Early Retirement Benefits Under Section 204(g) of ERISA

"ERISA is a comprehensive statutory scheme designed to protect employees enrolled in pension and benefit plans." *Northeast Dept. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 162 (3d Cir. 1985). In 1984, Congress amended ERISA to protect early retirement benefits in certain circumstances. Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984). In this case, ERISA protects Mr. Hein's right to qualify for unreduced early retirement benefits while working at his same job for a new employer.

In *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137 (3d Cir. 1993), the Third Circuit addressed the question of whether ERISA protects the rights of employees who continue at their same jobs for a successor employer to qualify for early retire-

ment benefits at a later date by meeting the pretermination requirements of their original employer's retirement plan. The plaintiffs in *Gillis* continued to work for a division of their original employer which had been sold to a new company. *Id.* at 1140. It was undisputed that before the division was sold neither of the plaintiffs qualified for early retirement benefits. *Id.* at 1143. However, the plaintiffs argued that ERISA protected their right to qualify for early retirement benefits under their original plan sometime in the future. *Id.*

The Third Circuit looked to the plain language of ERISA Section 204(g) for guidance:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment to the plan . . .
>
> (2) For the purposes of paragraph (1), a plan amendment which has the effect of—
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to services before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

29 U.S.C. § 1054(g) (1994). Subsection (g)(1) generally prohibits plan amendments which eliminate or reduce early retirement benefits. Subsection (g)(2) provides that, under certain circumstances, a plan amendment which reduces early retirement benefits is to be treated as a prohibited amendment under subsection (g)(1). *Id.* at 1144.

The plaintiffs in *Gillis* argued that denial of benefits under their previous employer's plan qualified as an "amendment" of the plan as that term is used in Section 204(g) and that,

under Subsection 204(g)(2), they must be given the opportunity "after the amendment" to satisfy "the preamendment conditions" for early retirement benefits. *Id.*[2]

After a detailed examination of the express language of ERISA, the statute's legislative history, and the relevant sections of the Internal Revenue Code,[3] the Third Circuit concluded that if the original employer had continued to employ the plaintiffs after terminating its plan, plaintiffs would have been able to qualify for early retirement benefits at a later date when they met the plan's requirements. *Id.* at 1145-46.

The Third Circuit then applied this same result to employees who continued at their same jobs for a successor employer. The court relied on *Hollingshead v. Burford Equip. Co.*, 809 F. Supp. 906, 917-18 (M.D. Ala. 1992) (holding that employee who did not meet 55-year age and 15 years experience requirement for early retirement benefits at time employer sold assets of business, could "grow into" entitlement by continuing in similar job with successor employer until requirements had been met), in concluding that employees who continued in their same jobs for a successor employer were not separated from service and would have the right to qualify for early retirement benefits at a later date. *Id.* at 1146-47.

Applying its interpretation of ERISA to the facts of the case before it, the Third Circuit held that the plaintiffs could continue to accumulate years of service while working for their new employer to be counted towards qualifying for early retirement benefits under their original employer's retirement plan. *Id.* at 1147-48.

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[2] Similarly, in this case, the Heins argue that McNeil's interpretation of the Plan and his decision to deny Mr. Hein unreduced early retirement benefits functioned as an "amendment," and, therefore, Mr. Hein must be given the opportunity "after the amendment" to satisfy "the preamendment conditions" for early retirement benefits. Pls.' Br. at 19.

[3] Many ERISA sections have counterparts in the Internal Revenue Code because Congress, in order to encourage employers to establish pension plans, has provided favorable tax treatment for plans that comply with ERISA requirements.

The Third Circuit's decision in *Gillis* is directly applicable to the case at hand.[4] Notwithstanding purported notices of termination, after the assets of the Howard Savings Bank were sold to First Fidelity, Mr. Hein continued to work at the same job for his new employer, First Fidelity. Even though Mr. Hein did not qualify for unreduced early retirement benefits when Howard Savings Bank was sold because he had not yet attained 55, ERISA protects Mr. Hein's right to qualify for these benefits at a later date by meeting the Plan's requirements. While working for First Fidelity, Mr. Hein met the Plan's requirements in December 1992 when he turned 55 and retired after more than thirty-five years of service. Mr. Hein is therefore qualified to receive unreduced early retirement benefits under the Howard Savings Plan.

For the foregoing reasons, the Heins are entitled to unreduced early retirement benefits under ERISA § 204(g), and, therefore cross-motion for summary judgment on Count One of their Amended Complaint is granted.

Conclusion

For the foregoing reasons, plaintiffs' cross-motion for summary judgment on Count One of the Amended Complaint is granted against McNeil and The Retirement Plan of the

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[4] In *Gillis*, there was a transfer of assets from the original employer's plan to the new employer's plan. The Third Circuit affirmed the finding of the district court which held that whether defendants transferred sufficient assets to the new company's plan to fund the employees' early retirement benefits is a disputed factual issue. *Gillis, supra*, at 1147.

In this case, defendants argue that the holding in *Gillis* should be limited to cases in which the sale of assets to the successor employer includes employee benefit plan assets. Defs.' Br. at 22. However, defendants concede that the main opinion in *Gillis* does not expressly limit its holding to such cases. Defs.' Br. at 22. More importantly, the court in *Gillis* adopts the reasoning of *Hollingshead, supra*, in which the original employer did not transfer any retirement plan assets to the successor employer. This court sees no reason why the Third Circuit's holding in *Gillis* should be so limited. *See Board of Trustees of Trucking Employees of New Jersey Welfare Fund Inc.–Pension Fund v. Centra*, 983 F.2d 495 (3d Cir. 1992) (ERISA, as a remedial statute, should be liberally construed in favor of protecting participants in employee benefit plans).

Howard Savings Bank. With respect to defendants McNeil and The Retirement Plan of the Howard Savings Bank, the court need not address the remaining counts of plaintiffs' Amended Complaint because plaintiffs have been granted what they seek, unreduced early retirement benefits, under Count One of the Amended Complaint. For similar reasons, the court need not address the FDIC's motion for summary judgment because plaintiffs are being granted the relief they request against the Plan.

/s/ H. LEE SAROKIN
H. LEE SAROKIN
U.S. District Judge

Date: September 13, 1994
Original to: Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 93-2418 (HLS)
Filed: September 13, 1994

JOHN M. HEIN and MERLENE HEIN,

Plaintiffs,

—v.—

FEDERAL DEPOSIT INSURANCE CORP., et al.

Defendants.

ORDER

This matter having been opened to the court upon the cross-motions of plaintiffs and defendants for summary judgment; and the court having considered the submissions of the parties; and for the reasons expressed in the accompanying opinion; and for good cause shown;

IT IS this 13 day of September, 1994, hereby

ORDERED that plaintiffs' cross-motion for summary judgment on Count One of the Amended Complaint against the defendants McNeil and The Retirement Plan of the Howard Savings Bank be and the same is hereby granted. Moreover, under Federal Rule of Civil Procedure 54(b), this court directs the entry of a final judgment as to Count One of plaintiffs'

Amended Complaint against defendants McNeil and The Retirement Plan of the Howard Savings Bank.

/s/ H. LEE SAROKIN
H. LEE SAROKIN
U.S. DISTRICT JUDGE

LETTERHEAD OF UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

February 22, 1995

McCarter & English, Esqs.
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102

Lum, Hoens, Conant, Danzis
& Kleinberg
103 Eisenhower Parkway
Roseland, NJ 07068

RE: Hein v. Federal Deposit Insurance Corporation, et al.

Docket No.: 93-2418 (WHW)

Gentlemen:

With regard to determining reasonable counsel fees to be awarded plaintiff in the above matter, I have reviewed the previously submitted affidavits of B. John Pendleton, Jr. and AnneMarie Dupont and the opposing memorandum of Messrs. McMahon and Weals.

Pursuant to 29 U.S.C. Section 1132 (g)(1) as explained in *Ursic v. Bethelehem Mines*, 719 F.2d 670 (3rd Circuit 1983), I had earlier determined, at time of oral argument, that the defendant "*Plan's*" conduct was wrong in necessitating this eventually successful legal challenge to its denied retirement benefits to plaintiff. The undenied conduct of the "*Plan*" in refusing to entertain any amicable resolution of this matter bordered on intransigence. The parties defendant have undenied ability to satisfy any fee award. Additionally, this type of award will alert other potential defendants in similar matters to view resolutions more favorably, consistent with the purpose of ERISA.

Reasonable counsel fees including reimbursement costs are $70,353.83.

I enclose the appropriate order.

Yours truly,

/s/ WILLIAM H. WALLS
William H. Walls, U.S.D.J.

WHW:c
Encl.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION
93-cv-2418 (WHW)

John M. Hein and Merlene Hein,

Plaintiffs

—v.—

Federal Deposit Insurance Corporation, et als.

ORDER

This matter having been opened to the Court by McCarter & English, Esqs., attorneys for the plaintiffs, in the presence of Lum, Hoens, Conant, Danzis & Kleinberg, Esqs., attorneys for the defendants Burton McNeil and the Retirement Plan of the Howard Savings Bank, and the Court having considered argument of counsel, various memoranda, exhibits and affidavits offered; and the Court having expressed its findings on the record;

It on this 22nd day of February, 1995:

ORDERED that counsel fees and costs in the amount of $70,353.83 be awarded to McCarter & English, Esqs. as attorneys for the plaintiffs against the defendants Burton McNeil and the Retirement Plan of the Howard Savings Bank.

/s/ WILLIAM H. WALLS
William H. Walls U.S.D.J.

Exhibit D-1

May 10, 1994

Retirement Plan of
THE HOWARD SAVINGS BANK
Newark, New Jersey

(as Revised as of December 1, 1985)

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RETIREMENT PLAN
of
THE HOWARD SAVINGS BANK
Newark, New Jersey

Introduction

The Retirement Plan of The Howard Savings Bank as amended through December 1, 1983 is hereby further amended and restated in this instrument effective December 1, 1984 to comply with the Tax Equity and Fiscal Responsibility Act of 1982 and effective December 1, 1985 to comply with the Retirement Equity Act of 1984 and the Deficit Reduction Act of 1984. The terms and provisions of the Plan as effective on or before November 30, 1985 will be applicable to Members who have retired, died or terminated service under the Plan prior to December 1, 1985. Except as expressly otherwise provided herein, the provisions of the Plan as herein set forth and as it may be further amended shall be applicable to all Employees as of December 1, 1985 and all future Employees.

Anything in this Plan to the contrary notwithstanding, no benefit payable to or on account of a Member retiring or terminating employment or dying on or after December 1, 1985 shall be less than the benefit accrued to him or on his account under the Prior Plan to November 30, 1985.

If immediately prior to December 1, 1985, any person was either receiving a retirement allowance or other benefit under the Prior Plan, or had a vested right thereunder, then such person shall continue to receive or retain the right to receive, under this Plan, the same benefit as was provided under the Prior Plan.

SECTION I

Definitions

The following words and phrases have the following meanings, unless otherwise required by the context:

(1) "Accrued Benefit" means the benefit earned by a Member as of the date of reference under Section VI (1) and (2). However, in no event will a Member's Accrued Benefit be less than the benefit stated in Section VI(5).

(2) "Actual Retirement Date" means the date on which the service of an Employee is terminated by retirement.

(3) "Actuarial Equivalent" means an amount determined by the Insurance Company (in the case of Retirement Annuity Benefits) and/or the Committee (in the case of Retirement Benefits) to be equivalent to another benefit or amount on the basis of actuarial tables adopted or approved by the Insurance Company and/or Committee and in effect at the time of such determination. The Actuarial Equivalent at this time shall be based upon the UP-1984 mortality table assuming 7-1/2% interest per annum.

(4) "Annual Salary" means the annual basic salary, excluding any overtime pay, bonuses and any other special remuneration, being paid by the Bank to an Employee as of the date of any determination thereof required under the Plan. In the case of any Hourly-Paid Employee, Annual Salary means such Employees hourly rate of pay on December 1 of the particular Plan Year multiplied by 1,820.

(5) "Approved Leave" means an absence, without compensation, approved by the Bank such as an interruption in service or a leave of absence for service with governmental agencies, for sickness or disability, for

maternity leave, for educational purposes or military absence. Except for sickness, disability or military service, no Approved Leave shall exceed two years. Approved Leaves will be granted in a non-discriminatory manner. Military absence means (a) the period or periods during which the employment of an Employee by the Bank shall, in time of war or emergency, be or have been interrupted by service in the military or naval service of the United States, the State of New Jersey or any other state, or in the Coast Guard or Merchant Marine of the United States, or in any auxiliary or reserve corps serving therewith, or by engagement in any war work by enlistment or induction under any Selective Service or similar statute, or, with leave of the Bank, by engagement in any war relief, social service or other activity related to war conditions, or in time of peace, by absence or leave and engagement in training of temporary service of a similar character, and (b) the period after termination of such service or engagement during which re-employment with the Bank is provided for by law, and (c) a period not exceeding one year of incapacity as a result of such service or engagement. An Employee on an Approved Leave (for any of the above reasons including disability) shall receive credit for benefit accrual at the same salary rate in effect at the time the Approved Leave commenced. The Employee will also receive credit for Vesting Service for the period of time he is on an approved leave.

(6) "Bank" means The Howard Savings Bank and any affiliate or subsidiary which shall adopt this Plan for its employees with the approval of the Bank by a Committee resolution.

(7) "Board of Directors" means the Board of Directors of the Bank.

(8) "Break-in-Service" means any Plan Year during which a Member does not complete more than 500 Hours of Service. Approved leaves shall not be regarded as constituting a break in service for the purpose of this definition.

(9) "Committee" means the Retirement Committee appointed by the Chairman of the Board to manage and administer the Plan, as provided in Section XII.

(10) "Date of Employment" means the date on which service began or begins.

(11) "Eligibility Service" means the twelve (12) month period following an Employee's Date of Employment during which he has completed 1,000 Hours of Service or the first Plan Year beginning after his Date of Employment during which he completes 1,000 Hours of Service.

(12) "Employee" means any person who is employed by the Bank and who received compensation from the Bank other than a pension, retirement allowance, retainer or fee under contract. Employee shall also include any re-employed retirees as referred to in Section IV(3)(b) of the Plan.

(13) "Fund" means the Trust Fund identified under Section XIII.

(14) "Group Annuity Contract" means Group Annuity Contract No. R-130, dated March 2, 1936, between the Bank and the Insurance Company, as heretofore and hereafter amended and/or supplemented.

(15) "Hours of Service" means:

(a) Each Hour of Service for which the Bank, either directly or indirectly, pays an Employee, or for which the Employee is entitled to payment, for the performance of duties during the Plan Year. The Committee shall credit Hours of Service

under this paragraph (a) to the Employee for the Plan Year in which the Employee performs the duties, irrespective of when paid;

(b) Each Hour of Service for back pay, irrespective of mitigation damages, to which the Bank has agreed or for which the Employee has received an award. The Committee shall credit Hours of Service under this paragraph (b) to the Employee for the Plan Year(s) to which the award or the agreement pertains rather than for the Plan Year in which the award, agreement or payment is made, and;

(c) Each Hour of Service for which the Bank, wither directly or indirectly, pays an Employee, or for which the Employee is entitled to payment (irrespective of whether the employment relationship is terminated), for reasons other than for the performance of duties during a Plan Year, such as leave of absence, vacation, holiday, sick leave, illness, incapacity (including disability), layoff, jury duty or military duty. The Committee shall credit Hours of Service under this paragraph (c) for the Plan Year in which the Bank pays the Employee, the Employee becomes entitled to payment or the payment becomes due, whichever first occurs. Notwithstanding the preceding provisions of this paragraph 15(c), the Committee shall not credit:

(1) More than five hundred one (501) Hours of Service under this paragraph (c) to an Employee on account of any single continuous period during which the Employee does not perform any duties (whether or not such period occurs during a single Plan Year);

(2) An Hour of Service to an Employee on account of a period during which the Employee does not perform any duties if the payment the Bank makes (or the payment due) is under a plan maintained solely for the purpose of complying with the applicable workman's compensation law, unemployment compensation law or disability insurance law, and;

(3) An Hour of Service for a payment to an Employee which solely reimburses the Employee for medical or medically related expenses incurred by the Employee.

The Committee shall not credit an Hour of Service under more than one (1) of the above paragraphs. Furthermore, if the Committee is to credit Hours of Service to an Employee for the twelve (12) month period beginning with the Employee's Employment Commencement Date, then the twelve (12) month period shall be substituted for the term "Plan Year" wherever the latter term appears in this Section I(15).

The Committee shall resolve any ambiguity with respect to the crediting of an Hour of Service in favor of the Employee. Furthermore, in crediting Hours of Service under this Section I(15), the Committee shall apply the rules of paragraphs (b) and (c) of Labor Regulation Section 2530.200b-2, which the Plan, by this reference, specifically incorporates in full within this Section I(15).

(16) "Insurance Company" means the Prudential Insurance Company of America and its corporate successors.

(17) "Member" means any Employee who qualifies and continues to be qualified under Section IV, including in appropriate cases a qualified Employee whose service is terminated but who is or may become entitled

to receive Retirement Income, whether commencing at such termination or at a later date.

(18) "Normal Retirement Date" and "Early Retirement Date" are defined in Section V.

(19) "One Year Break-in-Service" means each Plan Year during which an Employee shall not have accumulated more than 500 Hours of Service. There shall not be a One Year Break-in-Service for any period of absence due to pregnancy, birth or adoption of a child, or caring for a child following birth or adoption provided that the Employee furnishes the Committee with such timely information as the Committee shall require to verify that the absence from service is for the purposes of the above. Hours of Service shall be credited to the Employee in the Plan Year in which an absence from service commences if such crediting of Hours of Service would prevent a One Year Break-in-Service. In each other case such Hours of Service will be credited in the subsequent Plan Year.

(20) "Plan" means the Retirement Plan of the Bank heretofore established, as amended and/or supplemented hereby and from time to time hereafter.

(21) "Plan Year" means the twelve-month period from December 1st of each calendar year to and including the succeeding November 30th.

(22) "Qualified Domestic Relations Order" means a judgment, decree or order which relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child or other dependent of an Employee made pursuant to a state domestic relations order. Such Qualified Domestic Relations Order must specify the name and address of the Employee and alternate payee, the amount or percentage (or a determination thereof) of the Employee's benefit to be paid to the alternate payee, the number of

payments (or periods) to which the order applies and that the order applies to the Plan.

(23) "Qualified Joint and Survivor Annuity" means a form of benefit payment which is a benefit to be paid to the Member during his lifetime in reduced monthly payments ending on the first day of the month in which his death occurs, and to the Member's spouse, commencing on the first day of the next succeeding month, in monthly payments equal to 50% of such reduced monthly payments to the Member.

(24) "Retirement Annuity Benefits" means the benefits purchased under the Group Annuity Contract with respect to service prior to December 1, 1952.

(25) "Retirement Benefits" means the benefits payable out of the Fund, computed as provided in Section VI, irrespective of whether said benefits relate to service prior or subsequent to December 1, 1952 or to service with a "Predecessor" as defined in Section IV(4).

(26) "Retirement Income" means the income payable upon retirement under the Plan or, when the context so indicates, other benefits or payments in lieu thereof.

(27) "Trustee" shall mean the trustee or trustees which may be appointed by the Board of Directors by whom the funds of the Plan are held as provided in Section XIII.

(28) "Vesting Service" means each Plan Year during which an Employee completes 1,000 Hours of Service. Vesting Service earned prior to December 1, 1976 shall be determined in accordance with the plan in effect on November 30, 1976. In addition, Vesting Service shall not begin to be credited for an Employee of an affiliate or subsidiary of The Howard Savings Bank until the actual date the affiliate or subsidiary adopts this Plan.

SECTION II

Effective Date

(1) The effective date of the Plan as established was December 1, 1935, and December 1st of each year thereafter was or hereafter shall be an anniversary date of the Plan, and the beginning of a new Plan year. The effective date of the revision of the Plan hereby is December 1, 1985.

SECTION III

Funding of Retirement Income

(1) From December 1, 1935 to November 30, 1952 all Retirement Income had been purchased from the Insurance Company under the Group Annuity Contract. From and after December 1, 1952 to May 31, 1972 Retirement Income was provided by contributions to the Fund by the Bank and Members. Since June 1, 1972, no further contributions have been required of Members.

(2) The rights of Members to the Retirement Annuity Benefits will not be adversely affected by the discontinuance of such purchases, and, any other provisions of the Plan to the contrary notwithstanding, such Retirement Annuity Benefits shall continue to be payable in accordance with the terms and conditions of the Group Annuity Contract.

(3) Retirement Income payable with respect to service on and after December 1, 1952, to be provided by means of contributions to the Fund by the Bank and Members, will be in addition to the Retirement Annuity Benefits.

(4) Benefits provided by this Plan shall be funded in the following manner: contributions shall be determined using an acceptable actuarial cost method in order to provide the benefits required by this Plan.

SECTION IV

Eligibility

(1) (a) Each Member of the Plan as of May 31, 1979 shall continue as a Member of the Plan as of June 1, 1979.

(b) If an Employee of the Bank on June 1, 1979, whose Date of Employment was prior to his attainment of age sixty (60) and subsequent to December 1, 1978, attains the age of thirty-five (35) on or before June 1, 1979 and has completed one (1) year of Eligibility Service, he shall become a Member of the Plan retroactively as of June 1, 1979.

(2) Each other Employee of the Bank as of May 31, 1979 who is not a Member of the Plan on such date, and each Employee hired on and after June 1, 1979, shall become a Member of the Plan on June 1 or December 1 next following the earlier of the completion of one (1) year of Eligibility Service and the attainment of the age of twenty-five (25) years or as of December 1, 1985 the Employee shall become a Member upon completion of one (1) year of Eligibility Service and the Attainment of age twenty-one (21) years; provided, however, no Employee shall become a Member who was, or shall be, within five years of Normal Retirement Date on his Date of Employment.

(3)(a) If, for any reason, employment of any Member is terminated, and he is subsequently re-employed prior to his incurring a Break-in-Service, such Member shall be immediately eligible to participate and shall be restored to his prior status. If, for any reason, employment of any Member is terminated, and he is subsequently re-employed after he has incurred a One Year Break-in-Service, such Member shall be eligible to participate upon the completion of the eligibility requirements in Paragraph (2) of this Section IV. If the above Member had vested rights prior to his termination, upon completion of the eligibility waiting period, he shall receive all

prior credited service plus a year of Vesting Service for the eligibility waiting period. If the Member did not have a non-forfeitable right to his Accrued Benefit attributable to Bank contributions at the time he incurred a One Year Break-in-Service, then upon his re-employment, if the consecutive One Year Breaks-in-Service equals or exceeds the greater of (1) five (5) years or (2) the aggregate number of years of Vesting Service prior to such One Year Break-in-Service the Member's prior Vesting Service and Accrued Benefit will be cancelled.

(b) Notwithstanding anything in the above subsection (a) to the contrary, if the re-employed Member was receiving Retirement Income at the time of his re-employment, such Retirement Income shall cease during such period of re-employment, such Retirement Income shall cease during such period of re-employment. If re-employment occurs prior to Normal Retirement Date, such Member's Eligibility Service, Vesting Service and Accrued Benefit (adjusted for any withdrawal of his own contributions) credited to him at any time of his prior retirement or termination of employment shall be restored to him. The provisions of Section IX and X hereof will again be applicable to him. Upon subsequent retirement or death of such re-employed Member, benefits shall be based on Credited Service and Annual Salary before and after the period prior to retirement or termination with appropriate actuarial adjustment of any Retirement Income previously received.

Notwithstanding the foregoing, a Member will be deemed to be retired at anytime including a period of time after he is re-employed for which time such Member continues to perform services for the Bank and receives payment for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence for less than 75 hours of employment in any calendar month. A Member who is deemed to be retired under the provisions of the preceding sentence shall be considered to have commenced (or contin-

ued) retirement and shall receive any retirement pension payable and due on the first day of the calendar month in which such Member received remuneration for less than 75 hours of employment. Any Member under the circumstances above who completes more than 75 hours of employment in any calendar month will not be deemed retired unless the Committee so decides.

(4) If, as a result of the acquisition, by purchase of assets, merger or consolidation, or otherwise, of any other banking institution or other entity (hereinafter termed "Predecessor") the Bank shall acquire a group or groups of employees whose service with such Predecessor makes them eligible for membership in this Plan, the Committee may allow credit for past Vesting Service, Eligibility Service and benefit accrual in whole or in part with Predecessor to the group or groups of employees so acquired, either under the terms of this Plan or under any modification thereof, as it deems appropriate in the circumstances. The employees of each such Predecessor, as well as the Employees of the Bank at the time of such acquisition, may be identified as separate group for the purpose of funding the liability with respect to their benefits, subject, however, to the following provision. Any other provisions of this Plan to the contrary notwithstanding, the Committee shall have power, in its discretion, to allocate the total contributions by the Bank in any period among the funds for the respective benefit of the several groups of its Employees in such manner and in such proportions as to promote and attain equivalence among the ratios of the value of the respective assets constituting the reserve fund for each group to the respective actuarial reserve requirements for accrued benefits for each group. When the said ratios with respect to any two or more such groups shall have attained substantial equivalence, the Bank shall have power to direct the Trustee to, and the Trustee shall accordingly, merge the total assets of the trust funds for said two or more groups into a single trust fund for the combined benefit of all Employees in the said groups as a single group thereafter. For the purposes of this Para-

graph (5) "assets" shall be construed to include any assets accumulated and held or formerly held in trust for any such group under a retirement or similar plan provided by the Predecessor.

An employee of a Predecessor who becomes an Employee by reason of the Bank's acquisition of such Predecessor shall be deemed to be eligible for membership in, and to become a Member of, the Plan as of such date (not prior to the effective date of such acquisition) as the Committee shall determine, provided he shall have met the requirements of Paragraph (2) of this Section on such date.

(5) Any Member who has transferred from an affiliate or subsidiary which has not adopted this Plan (as referred to in Section I (6)) may, upon becoming a Participant in this Plan after meeting the eligibility requirements of Section IV (2), receive credit for past Vesting Service, Eligibility Service and benefit accrual in whole or in part with the affiliate or subsidiary during which time the Employee was covered by a plan of the affiliate or subsidiary. In addition, any Member upon transferring to an affiliate or subsidiary. In addition, any Member upon transferring to an affiliate or subsidiary which has not adopted this Plan shall receive credit for past vesting service in whole or in part with this plan. However, such employee will only receive credit for benefit accrual under the new plan.

SECTION V

Retirement

Normal Retirement Date

(1) Each Member shall normally retire and commence to receive Retirement Income on his Normal Retirement Date. A Member shall have a nonforfeitable and 100% right to his Accrued Benefit upon attainment of Normal Retirement Age.

Normal Retirement Age shall have the same meaning as Normal Retirement Date as defined in Section V(2), (3) and (4) below. A Member may continue at his request in the employ of the Bank after his Normal Retirement Date until the first of the month coinciding with or next following his seventieth (70th) birthday. He shall not accrue any additional benefits for his employment after Normal Retirement Date and shall commence to receive Retirement Income on his Actual Retirement Date.

(2) Prior to December 1, 1952, the Normal Retirement Date (a) for each male Member was the December 1st nearest his sixty-fifth (65th) birthday, and (b) for each female Member was (i) the December 1st on or next following the date on which she attained the age of sixty (60) years, or (ii) if she had completed thirty (30) years of Vesting Service, the December 1st nearest her sixtieth (60th) birthday.

(3) Subject to the following Paragraph (4), from and after December 1, 1985, the Normal Retirement Date of each Member shall be the first day of the month coinciding with or next following his sixty-fifth (65th) birthday and ten (10) Years of Service; provided however, that Normal Retirement Date shall be the first day of the month coinciding with or next following his sixty-fifth (65th) birthday for Members as of November 30, 1985; and further provided that Normal Retirement Date shall be the earlier of the foregoing date or the December 1st nearest their 65th birthday for Members as of November 30, 1976.

(4) For the purpose of determining rights to Retirement Annuity Benefits purchased or accrued for a female Member with respect to service prior to December 1, 1952, the Normal Retirement Date of such female Member from and after December 1, 1952 shall continue to be as provided in Paragraph (2)(b) of this Section. For all other purposes, including the application of Paragraph (5) of this Section, the Normal Retirement Date of such female Member from and after December 1, 1952 shall be as provided in Paragraph (3) of

this Section, unless the use of such date for any such purpose would deprive such female Member of or adversely affect her right to such Retirement Annuity Benefits.

Early Retirement Date

(5)(a) Any Member, upon written application filed with the Committee at least three (3) months prior thereto, may retire on the first day of any calendar month in which he attains his fifty-fifth (55th) birthday and ten (10) Years of Service herein termed "Early Retirement Date."

(b) If a Member retires on his Early Retirement Date, (i) benefit accruals shall cease on his Early Retirement Date, and (ii) payments of Retirement Income shall commence, at the option of the Member, either (x) on his Normal Retirement Date (in which event he will receive the amount of Retirement Annuity Benefits and/or Retirement Benefits which have accrued to his Early Retirement Date) or (y) on the first day of any month coinciding with or following his Early Retirement Date (in which event he will receive the said benefits reduced by 1/2 of 1% for each unattained month after the date his benefits commence and prior to his 60th birthday and 1/4 of 1% for each unattained month after his 60th birthday and prior to his Normal Retirement Date); provided, however, the foregoing reduction in benefits shall not be made if the Member has attained any combination of the ages and the years of Vesting Service, combinations set forth below on his Actual Retirement Date:

Age on Actual Retirement Date	Vesting Service on Actual Retirement Date
55	35
56	34
57	33
58	32
59	31
60	30

Age on Actual Retirement Date	Vesting Service on Actual Retirement Date
61	29
62	20
63	20
64	20

SECTION VI

Amount of Retirement Income

(1) The amount of Retirement Income for each Member shall, subject to the limitations expressed in Subsection 6 hereof and Section XV, be the amount of

(a) his Retirement Annuity Benefits, if any, and;
(b) his Retirement Benefits, if any, for a Member as of November 30, 1976, accrued for him as of that date, and;
(c) his Retirement Benefits, if any, accrued for him during Plan Years beginning on and after December 1, 1976.

(2) Subject to the provisions of Paragraph (4) below, the Retirement Benefits to which each Member shall be entitled with respect to service on and after December 1, 1976 shall be as follows: Each Member upon attaining his Normal Retirement Date shall be entitled to receive an annual retirement benefit equal to two and one-half percent ($2^1/_2\%$) of his Annual Salary with respect to each Plan year, such Annual Salary to be determined as provided in Paragraph (3) of this Section VI. The total of such annual accruals shall be his Retirement Benefits. For the purposes of this Paragraph (2) an Employee shall not accrue benefits for any period of a Plan Year in which he does not receive compensation from the Bank unless specifically set forth to the contrary elsewhere in

this Plan. If a Member completes 1,820 or more Hours of Service within a Plan Year, he shall be entitled to 100% of his annual benefit accrual for such Plan Year. If a Member completes between 1,000 and 1,820 Hours of Service in a Plan Year, he shall receive credit for one month for each 151 Hours of Service completed by him during such Plan Year. If a Member completes less than 1,000 Hours of Service, he will receive no annual benefit accrual, with the exception of an Employee who completes less than 1,000 Hours of Service during a Plan Year in which he terminates, dies or retires and who completed 1,000 or more Hours of Service in the Plan Year prior to his termination of service, death or retirement. Such Employee will receive credit for one month for each 151 Hours of Service completed by him during the Plan Year.

(3) The Annual Salary of each Member in respect of each Plan Year shall be determined as of December 1st of such year, except that the Annual Salary of an Employee other than an hourly paid Employee who becomes a Member on any June 1st shall be initially determined as of said date and thereafter as of each December 1st. All such determinations shall be made by the Committee.

(4) The Retirement Benefits of any Member whose service includes service with a "Predecessor" as defined in Section IV (5) shall include the benefits purchased or accrued for such Member under any pension or retirement plan of such Predecessor if, and to the extent that, the assets of such plan have been or shall be transferred to the Fund; and, if such Member shall have been allowed credit for past service with such Predecessor pursuant to Section IV (5), shall also include the amount of monthly income provided by the contributions of the Bank and the contributions (if any) of such Member with respect to such past service

(5) Anything in this Section VI to the contrary notwithstanding, subject to the limitations expressed in Section XV, the amount of annual Retirement Income Payable to or with

respect to a Member who attains his Normal Retirement Date shall be not less than an amount equal to one-sixth of one per centum of his Average Annual Salary, multiplied by the number of months of his Credited Service; provided, however, for a Member whose Date of Employment is on or after January 1, 1982, one-eighth of one per centum shall be substituted for one-sixth of one per centum. As used in this Paragraph (5), the following words have the following meanings:

(x) Average Annual Salary means the average rate of Annual Salary, determined as of December 1 of each year, paid to an Employee for the five highest consecutive years (or fewer years, if the Employee has less than five) during the period commencing on December 1 of the tenth Plan Year preceding the Plan Year in which the Member retires, dies or attains his Normal Retirement Date, whichever is earliest, and ending on the November 30 preceding the Member's Normal Retirement Date or the date of his retirement or death, if earlier; and

(y) Credited Service means the number of completed months from a Member's Date of Employment up to a maximum of three hundred sixty (360) months, however, for a Member whose Date of Employment is on or after January 1, 1982 four hundred eighty (480) months shall be substituted for three hundred sixty (360) months.

If a Member has less than 1,820 Hours of Service, he shall receive Credited Service in accordance with Section VI(2).

Hours of Service for any Member who was ineligible to become a Member as of November 30, 1976 because of having attained an age greater than the maximum age for participation in the Plan as of his Date of Employment shall be ignored for Plan Years beginning prior to December 1, 1976.

An appropriate adjustment of the foregoing minimum amount of annual Retirement Income shall be made in the event that a Member entitled thereto retires on an Early Retirement Date pursuant to Section V, elects an Optional Retirement Benefit pursuant to Section X and/or receives Retirement Income under the Qualified Joint and Survivor Annuity form provided in Section VIII (7).

(6) The Limitations outlined below shall only apply to that portion of the benefit which is provided by Bank contributions. The benefit provided under this Article for any Member cannot exceed the lesser of:

(a) $90,000 (the "Dollar Limitation") per year, assuming a life only annuity, subject to cost of living adjustments as determined by the Secretary of Treasury, or

(b) 100% of the Member's annual compensation as defined in Section 1.415-2(d)(1)(i) of the Income Tax Regulations averaged over his high consecutive three years of employment (the "Compensation Limitation").

In determining whether a benefit under the Plan exceeds the Dollar Limitation, the benefit under the Plan, if not in the form of a life annuity shall be adjusted to be the Actuarial Equivalent of the benefit as a life annuity.

In the event a Member has less than ten years of Vesting Service, the limitation referred to above shall be reduced by a fraction, the numerator of which is the number of Years of Service with the Bank and the denominator of which is ten (10). The limitation shall not be reduced if the benefits are payable at or after age 55 or if payable in the Qualified Joint and Survivor Annuity form provided in Section VIII (7). If a Member never participated in a defined contribution plan of the Bank, the annual benefit from this Plan and any other defined benefit plan maintained by the Bank need not be lim-

ited to less than $10,000 by application of the above limitations.

For any Member who is also a participant in the Bank's Incentive and Investment Plan, the amount of annual additions to the Member's account shall be reduced to the extent necessary to prevent the sum of the following fractions, computed as of the close of the Plan Year, from exceeding 1.0:

Projected annual benefit of the member under this Plan as of the close of the Plan year
Projected annual benefit of the Member under this Plan if it provided the maximum benefit allowed under this Paragraph (6) of Section VI.

Plus

Sum of annual additions to the Member's account under the Bank's Incentive and Investment Plan as of the close of the Plan Year
The maximum amount of the annual additions which could have been made under the Bank's Incentive and Investment Plan for such Plan Year and for all prior Plan Years.

The annual additions shall be reduced, if necessary, by first limiting or eliminating any voluntary contributions, second by reallocating any forfeitures to other Members, and lastly by reducing the Contribution Formula.

If benefits begin prior to age 65, the maximums will apply to such reduced benefit; provided that, if the benefit begins prior to age 62, the maximum Dollar Limitation applicable to such benefit shall be equal to an adjustment of the Dollar Limitation where the Dollar Limitation is deemed to be a pension commencing at age 62. However, such adjustment of the Dollar Limitation shall not result in a Dollar Limitation which is less than $75,000 with respect to a pension commencing on or after age 55.

If benefits after age 65, the maximum Dollar Limitation shall be the Actuarial Equivalent of a life annuity with an annual benefit of $90,000 commencing at age 65.

In determining the Actuarial Equivalent of the Dollar Limitation for a benefit commencing prior to age 62, the interest assumption shall not be less than five percent. In determining the Actuarial Equivalent of a benefit commencing after age 65, the interest assumption shall not be greater than five percent.

For all purposes of this Plan, the maximum Dollar Limitation of $90,000 shall be automatically increased as permitted by the Code and applicable Regulations to reflect cost-of-living adjustments. As a result of such an adjustment, a benefit which had been limited by the provisions of this Section in a previous calendar year may be increased with respect to future payments to the lesser of the adjusted Dollar Limitation amount or the amount of benefit which would have been payable under this Plan without regard to the provisions of this Paragraph (6) of Section VI.

For purposes of the above limitation, all defined benefit plans of the Bank, whether or not terminated, are to be treated as one defined benefit plan. The extent to which the benefit payable under this Plan shall be reduced as compared with the extent to which the annual benefit under any other defined benefit plans or defined contributions plans shall be reduced in order to achieve compliance with the limitations of Section 415 of the Code shall be determined by the Committee in such a manner so as to maximize the aggregate benefits payable to such Member. If such reduction is under this Plan, the Committee shall advise affected Members of any additional limitation on their annual benefits required by this paragraph.

The above limitations are intended to comply with the provisions of Section 415 of the Internal Revenue Code, as amended, so that the maximum benefits provided by the plans of the Bank shall be exactly equal to the maximum amounts

allowed under Section 415 of the internal Revenue Code and regulations thereunder. If there is any discrepancy between the provisions of this Section 6 and the provisions of Section 415 of the Internal Revenue Code and regulations thereunder, such discrepancy shall be resolved in such a way as to give full effect to the provisions of Section 415 of the Internal Revenue Code.

SECTION VII

Contributions

(1) Prior to June 1, 1972 contributions were required of Members for the accrual of benefits. Since June 1, 1972 no further contributions have been required of Members.

(2) Subject to the reservations expressed in Sections XIV and XV, from and after June 1, 1972, the Bank shall contribute to the Fund such amounts as may be required to provide the Retirement Incomes to be paid under the Plan.

SECTION VIII

Percent of Retirement Income

(1) All Retirement Income, including the Optional Retirement benefits payable to contingent annuitants as provided in Section X, shall be due on, and shall be payable in monthly installments on, the first day of the calendar month, in such manner as the Committee shall determine, and shall continue to the last payment prior to death, provided, that:

(a) if the monthly installment of Retirement Income payable to a member, or his spouse or contingent annuitant either (i) under the Group Annuity Contract or (ii) out of the Fund is less than Twenty-five Dollars ($25), payment thereof may be made in

quarterly, semi-annual or annual installments, as the Insurance Company and/or the Committee shall respectively determine; and

(b) In the event of retirement, death or termination of employment of a member, the Committee may in its sole discretion distribute the member's vested benefit as a lump sum payment provided the present value of the benefit is not in excess of $3,500. In no event mar a lump sum payment be made after the Member's benefit commencement date without the consent of the Member. In addition, in no event shall a lump sum payment in excess of $3,500 be made Without the consent of the Member and the Member's Spouse. For purposes of this subsection (b), such present value of an Employee's vested benefit shall be determined using an interest rate not greater than the interest rate which would be used by the PBGC for purposes of determining the present value of such lump sum distribution on plan termination. Such rate shall be determined on the first day of the Plan Year and shall remain effective for the remainder of the Plan Year.

(2) Subject to Section IX, in case (a) of the death, disability or incapacity of a Member, beneficiary or contingent annuitant, or (b) his whereabouts have been unknown for a period of over one year, or (c) any amount payable to him remains unclaimed for a period of one year or more, all or any part of any amount payable to such Member, beneficiary or contingent annuitant out of the Fund may be paid to his guardian, if any, or his legal representatives (if he be deceased), or, in the discretion of the Committee, to his then spouse or children or next of kin or other persons appearing to be equitably entitled thereto.

(3) As a condition to (a) the receipt by any Member, his spouse, beneficiary or contingent annuitant of any benefit or payment out of the Fund or (b) any action or determination by the Bank or the Committee or the Trustee, he shall submit

such information and proof, including, in proper cases, the certificate of a physician or other professional person selected or approved by the Committee, as shall be satisfactory to, and execute such instruments as may be required by, the Committee or the Trustee.

(4) The issuance of a check, bank draft or money order, payable to the person entitled, and delivery or mailing thereof to him, shall constitute payment.

(5) The payment of the benefits under the Plan to the member shall begin not later than the 60th day after the close of the Plan Year in which occurs the latest of:

(a) the date on which the Member attains the earlier of age 65 or his Normal Retirement Date;

(b) the tenth anniversary of the year in which the Member became a Member, or;

(c) the date the Member terminates his Service with the Bank.

In no event shall a benefit payable under this Plan be deferred to commence later than the April 1st of the calendar year following the latter of:

(a) the calendar year in which the Employee attains age 70 1/2,

(b) the calendar year in which the Employee retires.

(6) If a Member with vested rights attributable to contributions by the Bank under this Plan separates from the service of the Bank prior to satisfying the age requirement for early retirement benefits, as set forth in Paragraph (5)(a) of Section V hereof, such Member shall, upon attaining the age requirements for receiving such early retirement benefits, be entitled to elect to have payments made to him on and after meeting such age requirements in an amount equal to the benefit he would have received at normal retirement age, actuarially reduced.

(7) Notwithstanding all other provisions of this Plan, unless he elects not to take the Qualified Joint and Survivor Annuity provided in this Section (in accordance with the election procedure below, the Retirement Income of a Member who is married on the date his Retirement Income is to commence shall be paid in the form of a Qualified Joint and Survivor Annuity which is the Actuarial Equivalent of his Retirement Income pursuant to Section VI hereof. Each Member who is eligible for the Qualified Joint and Survivor Annuity shall be provided by the Plan Administrator with a written explanation in nontechnical language at least ninety (90) days prior to the date his Retirement Income is to commence that he shall receive his Retirement Income in the Form of a Qualified Joint and Survivor Annuity which will provide that the benefit to his Spouse will be 50% of a Member's benefits. Such explanation must set forth the terms and conditions of the Qualified Joint and Survivor Annuity and the financial effect upon the Member's Retirement Income in terms of dollars per annuity percent of making an election not to take the Qualified Joint and Survivor Annuity.

(a) An election not to take the Qualified Joint and Survivor Annuity must be made in writing by the Member and consented to by the Spouse, also in writing In addition, this election will not be effective unless witnessed by a member of the Committee or a Notary Public and must be made within 90 days prior to the commencement of benefits. An election to waive this mandatory form may also be revoked within this time period.

(b) If the Member elects not to take the mandatory form of benefit set forth above, he shall receive the benefit in the form otherwise provided herein.

SECTION IX

Death Benefits

(1) Upon the death, on or after his Actual Retirement Date or on or after Normal Retirement Date, but prior to Actual Retirement Date, of a Member who had elected not to receive the Qualified Joint and Survivor Annuity provided under Section VIII (7) and who had not elected the Optional Retirement Benefit under Section X and whose Spouse has consented to the waiver of the Survivorship Benefit as discussed below, there shall be payable to the beneficiary designated by such member a Death Benefit equal to the excess of (a) such Member's contributions to the Insurance Company and/or the Fund under the Plan plus interest at the rate of 5% per annum after December 1, 1976 to Normal Retirement Date or Actual Retirement Date, if earlier, over (b) the Retirement Income (if any) theretofore paid to such Member.

(2) Each Employee, upon becoming a Member, shall designate in writing filed with the Committee, a beneficiary to receive any lump sum amount (herein termed "Death Benefit") which may become parable, as provided in paragraphs (2) and (3) of this Section, upon the death of such Member. The Member shall have the right to change such beneficiary from time to time by filing written notice thereof with the Committee, and on or as of the same date with the Insurance Company if benefits have been purchased for such Member under the Group Annuity Contract, in such form as is respectively prescribed by them, and such change shall take effect as of the date on which said notice was so filed.

(3) Subject to Paragraph (8) of this Section IX, upon the death of a Member prior to his Normal or Early Retirement Date there shall be payable to the beneficiary designated by a Member a Death Benefit equal to such Member's contributions to the Insurance Company and/or the Fund under the Plan plus interest at the rate of 5% per annum after December 1, 1976 to the date of death of such member.

(4) If there is no designated beneficiary living at the time of a Member's death, his Death Benefit (if any) shall be payable to such of the following persons as may be then living, in the indicated order of precedence: to (a) the then spouse, (b) child or children in equal shares, or (c) parents in equal shares or the survivor, of such Member, or if none of said persons is then living, to (d) his legal representatives.

(5) No beneficiary shall be entitled to the payment of any Death Benefit until the Insurance Company and/or the Committee shall have received proof in writing satisfactory to it or them of the death of the Member upon whose death such benefit is payable.

(6) If a Member who became a Member of the Plan prior to December 1, 1985, dies before his Early or Normal Retirement Date and withing ten (10) years prior to his Normal Retirement Date, his surviving spouse shall be entitled to receive a monthly Survivorship Benefit payable as a Qualified Joint and Survivor Annuity commencing on the first day of the month following the death of the Member. The amount of such Survivorship Benefit shall be equal to:

(a) If the surviving spouse is not more than five (5) years younger than the deceased Member - 50% of the Member's Accrued Benefit at the date of death.

(b) If the surviving spouse is more than five (5) years younger than the deceased Member - 50% of the Member's Accrued Benefit at the date of his death reduced by 1% of such amount for each year over five (5) years that the surviving spouse is younger than the Member.

(7) If a Member who became a Member of the Plan after December 1, 1985 shall die prior to his Normal Retirement Date or Early Retirement Date but after he has completed ten (10) years of Vesting Service, his Surviving Spouse shall be entitled to the monthly Survivorship Benefit as stated in (6) above. However, this benefit shall not commence until the

first day of the month following the date the Member would have attained age 55.

(8) Any former Member who dies after terminating service with the Company prior to August 23, 1984 with one Hour of Service after December 1, 1976 and a vested benefit such Surviving Spouse shall be entitled to a Survivorship Benefit. In addition, any former Member who dies after terminating service with the Company after August 23, 1984 with ten (10) years of Vesting Service shall also be entitled to the Survivorship Benefit in accordance with Section (6) above. In both these cases the benefit shall not commence until the first day of the month following the date the Member would have attained his 55th birthday.

If a Survivorship Benefit in accordance with Paragraph (6) of this Section IX shall be applicable with respect to a Member, the Death Benefit described in Paragraph (2) of this Section IX shall not be payable to the beneficiary designated by such Member and any amount otherwise payable by the Insurance Company to such beneficiary shall be paid to the Trustee, provided, however, that in the event of the death of the spouse prior to the receipt of Survivorship Benefit payments equal to the Member's contributions to the Insurance Company and/or the Fund, the Trustee shall pay to the beneficiary designated by the Member an amount equal to the excess of (a) such Member's contributions to the Insurance Company and/or the fund under the Plan plus interest at the rate of 5% per annum after December 1, 1976 to the date of death of such Member over (b) the Survivorship Benefit Payments theretofore paid to the spouse.

(9) If a Member (a) dies after retiring on his Early Retirement Date but prior to the date his Retirement Income is to commence without effectively electing the Optional Benefit under Section X, or (b) dies after his Normal Retirement Date but prior to his Actual Retirement Date without electing not to receive the Qualified Joint and Survivor Annuity provided under Section VIII (7) and without effectively electing the Optional Benefit under Section X, his Spouse, if any, shall

receive a benefit in the form of a Qualified Joint and Survivor Annuity determined pursuant to Paragraph 7 or Section VIII hereof and based on the assumption that such Member had elected as his benefit commencement date the first day of the month of his death.

SECTION X

Optional Retirement Benefit

(1) A Member may elect to receive (in accordance with the election procedure stated in Section (7) of Article VIII), with the consent of the Committee, in lieu of the Retirement Income payments to which he would otherwise be entitled, Optional Retirement Benefits consisting of reduced payments of Retirement Income commencing upon his retirement or the date payments commence if later and payable during his lifetime, with such reduced payments, or a stated fraction thereof, as the Member shall elect, continuing to be paid or commence to be paid after his death to, and during the lifetime of, a contingent annuitant designated by the Member at the time of such election; or any other Optional Retirement Benefit to which the Committee must approve. Provided, however, that if the contingent annuitant is other than the Spouse of the Member, the Optional Retirement Benefit may not be elected if it would result in payments to the Member of less than 50% of the value otherwise payable to him.

(2) The reduced amounts payable as Optional Retirement Benefits shall be determined by (a) the Insurance Company with respect to Retirement Annuity Benefits purchased under the Group Annuity Contract and (b) the Committee with respect to Retirement Benefits payable out of the Fund. Such determination shall take into account the age and sex of the Member and contingent annuitant, and the relation which the monthly Optional Retirement Benefit Payable to the contingent annuitant bears to the monthly Optional Retirement Benefit payable to the Member.

(3) The election of the Optional Retirement Benefit shall be made by written request filed with the Committee (and on or as of the same date with the Insurance Company if benefits have been purchased for the Member under the Group Annuity Contract) within a reasonable time prior to the Member's Normal or Early Retirement Date subject to Article VIII, Section 7 (a).

(4) If contingent annuitant designated by a Member dies before the Member's Actual Retirement Date, Retirement Income shall be payable as if no Optional Retirement Benefit had been elected.

(5) If the contingent annuitant designated by a Member dies after the Member's Actual Retirement Date, the amount of Optional Retirement Benefit payable to such Member shall not be changed.

(6) If both the Member (having retired) and his contingent annuitant die before the aggregate of the Optional Retirement Benefits paid to both of them equals the amount of the Member's contributions plus interest at the rate of 5% per annum after December 1, 1976, to Normal Retirement Date or Actual Retirement Date, if earlier, an amount equal to the excess of such contributions over such aggregate Benefits shall be paid as a Death Benefit to the person, or persons entitled thereto in accordance with Section IX hereof.

(7) If a Member dies after his Normal Retirement Date, but prior to his Actual Retirement Date, the contingent annuitant designated by the Member shall receive the benefit payable under the option elected by the Member.

(8) If the Member dies after distribution of his or her interest has commenced, the remaining portion of such Retirement Income, if any, will continue to be distributed at least as rapidly as under the method of distribution being used prior to the Member's death.

If the Member dies before distribution of his or her Retirement Income commences, the entire interest will be distributed no later than five (5) years after the Member's death

except to the extent that the distribution is received in accordance with (a) or (b) below:

(a) if any portion of the Member's Retirement Income is payable to the beneficiary, distribution may be made in substantially equal installments over the life or life expectancy of the beneficiary commencing no later than one year after the Member's death.

(b) if the beneficiary is the Member's surviving spouse, the date distributions are required to begin in accordance with (a) above shall not be earlier than the date on which the Member would have attained age 70 1/2 and, if the spouse dies before payments begin, subsequent distributions shall be made as if the spouse had been the Member.

SECTION XI

Termination of Service

(1) If a Member's service terminates for any reason other than his death or retirement, no further benefits shall be accrued by such Member.

(2) A Member whose service terminates, for any reason other than his death or retirement, before he has completed ten (10) years of Vesting Service, shall be entitled to elect either of the following options:

(a) he may withdraw in cash an amount equal to his total contributions paid to the Insurance Company and/or the Fund, respectively, under the Plan (with five per cent (5%) interest after December 1, 1976); or

(b) he may authorize the Trustee (and the Insurance Company, if he was a contributor prior to December 1, 1952) to retain such contributions, provided that

the amount so retained by either of them is not less than One Hundred Dollars ($100), in which event he shall receive a Retirement Income, commencing at Normal Retirement Date, in the amount provided by the contributions so retained, subject, however, to the provisions of Section VIII (1), multiplied by the appropriate conversion factor set forth in Section 204(c)(2)(B) of the Employee Retirement Income Security Act of 1974 and the Regulations issued thereunder from time to time.

(3) A Member whose service terminates, for any reason other than his death or retirement, after he has completed ten (10) years of Vesting Service, shall be entitled to elect within three months of his termination either of the following options:

(a) he may withdraw in cash an amount equal to his total contributions paid to the Insurance Company and/or the Fund, respectively, under the Plan (with five per cent (5%) interest from December 1, 1976 to date of withdrawal), in which event he shall receive a Retirement Income in an amount equal to his Accrued Benefit arising subsequent to May 31, 1972 to the date his services terminate, commencing at Normal Retirement Date, or if he so elects, on the first day of any month within ten (10) years prior to such Normal Retirement Date, with his Retirement Income then payable being the Actuarial Equivalent of such Accrued Benefit, or;

(b) he may authorize the Trustee (and the Insurance Company if he was a contributor prior to December 1, 1952) to retain such contributions, in which event he shall receive a Retirement Income in an amount equal to his Accrued Benefit, or if he so elects, on the first day of any month within ten (10) years prior to Normal Retirement Date, wih his Retirement Income then payable being the Acturial Equivalent of such Accrued Benefit.

(4) The withdrawal in cash of a Member's contributions may, in the discretion of the Committee (and at the option of the Insurance Company with respect to any contributions held by it), be paid in a lump sum or in twelve (12) consecutive monthly installments commencing on the first day of the calendar month following the Member's termination of service.

SECTION XII

Administration of the Plan

(1) The Administrator of the Plan shall be the Committee, and it shall be responsible for carrying out the provisions of this Plan. There shall be at least five members of the Committee who may be Members and who shall be appointed by and shall serve at the pleasure of the Chairman of the Board. Each person appointed as a member of the Committee shall signify his acceptance by filing a written acceptance with the Chairman of the Board and with the Secretary of the Committee. Any member of the Committee may resign by delivering his written resignation to the Chairman of the Board and to the Secretary of the Committee.

(2) The secretary of the Committee shall be the Fiduciary of the Plan upon whom service of process can be effected. The members of the Committee may appoint from their number such committees with such powers as they shall determine, may authorize one or more of their number or any agent to exercise any of the Committee's powers, ministerial or discretionary, or to exercise or deliver any instrument or make any payment in their behalf, and they may employ, with the approval of the Board of Directors, such services as they may require in carrying out the provisions of this Plan.

(3) The Committee shall hold meetings upon such notice, at such time or times and at such place or places, as it may determine from time to time.

(4) A majority of the members of the Committee at the time in office shall constitute a quorum for the transaction of business. All resolutions or other actions taken by the Committee shall be by the vote of a majority of those present at a meeting, but not less than two, or in writing by all the members at the time in office, if they act without a meeting.

(5) No member of the Committee who is an Employee shall receive any compensation for his service as such, but the Bank may reimburse any member of the Committee for any necessary expense incurred.

(6) Subject to the Plan, the Committee shall from time to time establish rules for the administration of the Plan. From tie to time the Committee shall adopt tables for use in all actuarial calculations required in connection with the Plan (other than those pertaining to the Group Annuity Contract). As an aid to the Committee in adopting table and in fixing the rates of contribution payable to the Fund, the actuary designated by the Committee shall make annual actuarial valuations of the contingent assets and liabilities of the Fund and shall certify to the Committee the tables and rates of contribution which he would recommend for use by the Committee. The Committee shall maintain or cause to be maintained accounts showing the fiscal transactions of the Plan, and shall keep or cause to be kept in convenient form such data as may be necessary for actuarial valuations of the Fund.

(7) Except as herein otherwise expressly provided, the Committee shall have the right to interpret the Plan and and to decide any and all matters arising thereunder or in connection with the administration of the Plan, including, but not limited to, the determination of any Employee's eligibility and the size and form of a Participant's benefits. The Committee shall endeavor to act by general rules or particular decisions so as not to discriminate in favor of any person.

(8) Each person who is or has been a member of the Committee shall be indemnified by the Bank against expenses (including amounts paid in settlement with the approval of the

Committee) and counsel fees reasonably incurred by him in connection with any action, suit or proceeding to which he may be a party or wit which he shall be threatened by reason of his being, or having been, a member of the Committee, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or wilful misconduct in the performance of his duties as such member of the Committee. The foregoing right of indemnification shall be in addition to any other rights to which any such member of the Committee may be entitled as a matter of law.

(9) If any person has not received, within the time periods specified in this Plan, a benefit under this Plan to which he thinks he is entitled as an Employee or former Employee of the Bank, or as the beneficiary of an Employee or former Employee of the Bank, he or his authorized representative, within 180 days after the event that he believes entitles him to such benefit, may file with the Administrator a written claim for the benefit, in any form reasonably calculated to bring the nature of his claim to the attention of the Administrator. If the claim is denied in whole or in part, the Administrator shall, not later than 90 days from receipt of the claim, give to the claimant or his authorized representative written notice of the denial. Such notice shall be set forth in a manner calculated to be understood by the claimant the following items:

(a) The specific reason or reasons for the denial;

(b) The specific reference, or references, to the extent possible, to the pertinent provisions of the Plan on which the denial is based;

(c) A description of additional material or information, if any, necessary for the claimant to perfect his claim and an explanation of why such material or information is necessary.

(d) An explanation of the Plan's claim review procedure.

A claimant whose claim to benefits under this Plan has been denied in whole or in part by the Administrator, or his authorized representative, may request a review of the claim by making written application to the Bank within 60 days of the claimant's receipt of the written notification of denial of this claim to the Administrator. In connection with the review, the claimant or his authorized representative shall be permitted to review relevant documents in the possession of the Bank and Administrator and may submit in writing a statement of the issues involved in the review and comments thereon. Within 60 days of receipt of the claimant's request for review, the Bank shall render its decision in writing setting forth (i) the specific reasons for the decision, written in a manner calculated to be understood by the claimant, and (ii) the specific references, to the extent possible, to the pertinent Plan provisions on which the decision is based. Subject to any rights or remedies provided by applicable law, the final decision of the Bank shall be conclusive and binding upon the Plan Administrator, the Trustee, the claimant and all other persons who have or may have an interest in the claim.

SECTION XIII

Management of the Fund

(1) All assets of the Plan shall be held as a trust for the exclusive benefit of Members and their beneficiaries, including the administrative expenses of the Plan and Fund, and no part of the corpus or income shall be use for or diverted to purposes other than for the exclusive benefit of Members and their beneficiaries. No Member or beneficiary, nor any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in any part of the earnings of the Fund, or any rights in any part of its assets except to the extent expressly provided in the Plan.

(2) The Bank shall enter into the Trust Agreement with the Trustee establishing the Fund which forms part of this Plan. The Trust Agreement shall be deemed to form part of this Plan and any and all rights and benefits which may accrue to any person under the Plan shall be subject to all the terms and provisions of the Trust Agreement.

(3) The Bank plans and intends to pay all of the administrative costs of the Plan and Fund in addition to its contribution to the Plan. However, if the Bank failed to pay any of the administrative expenses of the Plan and Fund, they may be paid from the Fund.

SECTION XIV

Amendment and Termination of Plan

(1) The Plan, as well as any part thereof, may be modified or amended at any time and from time to time by the Board of Directors, or may be terminated at any time by the Board of Directors, provided that, prior to the satisfaction of all liabilities with respect to Members (or their beneficiaries) and contingent annuitants under the Trust established under this Plan, no part of the corpus of the Trust or income thereof shall be used for, or diverted to, purposes other than for the exclusive benefit of the Members (or their beneficiaries) and contingent annuitants. In addition, upon such amendment or termination no portion of the corpus of the Trust or income thereof shall revert to or become the property of the Bank until all liabilities of the Trust pursuant to the Plan and Trust Agreement are satisfied. No such modification or amendment may be made which would divest any Member, beneficiary or contingent annuitant of any interest than vested in him, except that any modification or amendment may be made retroactively, if necessary, in order to secure the approval of the Commissioner of the Internal Revenue Service that this Plan

and Trust qualify under Sections 401(a) and 501(a) of the Internal Revenue Code.

(2) Upon any complete or partial termination of the Plan, every Member shall be fully vested in the Retirement Income accrued under the Plan to the extent then funded.

(3) Upon such termination (a) no further contributions shall be made by the Bank, (b) each Member (or his beneficiary) and contingent annuitant shall be entitled to receive, as and when the same become payable under the Group Annuity Contract, the Retirement Annuity Benefits (if any) purchased for such Member with respect to service prior to December 1, 1952 and (c) the Fund shall be allocated a of the date of termination for the benefit of Members (or their beneficiaries) and contingent annuitants in accordance with the provisions of Section 4044 of the Employee Retirement Income Security Act of 1974 and the Regulations issued thereunder from time to time.

(4) Upon such termination of the Plan, the assets of the Fund held for the account of Members (or their beneficiaries) and contingent annuitants as provided in the foregoing Paragraph (3) may be applied by the Committee in its discretion (a) to the purchase of insurance policies or annuity contracts or (b) to continuing the Fund in existence and making provision therefrom for Retirement Incomes for the persons entitled thereto under the foregoing Paragraph (3), or (c) to immediate distribution of the Fund.

SECTION XV

Limitation of Benefits

Limitations Imposed by Treasury Department

(1) Notwithstanding anything in this Plan to the contrary, in the event of termination of the Plan or failure to meet the full current costs of the Plan during the first ten (10) years after

any amendment increasing the benefits to be provided by contributions of the Bank, the contributions of the Bank for any of the twenty-five (25) highest paid Employees [excluding any of such Employees for whom the annual Retirement Income provided by the contributions of the Bank prior to that date and during the ensuing ten (10) years, based on his Annual Salary on that date, could not exceed fifteen hundred dollars ($1,500)] shall not be in excess of the largest of:

(a) The contributions of the Bank (or funds attributable thereto) which would have been applied to provide the benefits for such Employee if the Plan as in effect immediately prior to the effective date of such amendment had been continued without change;

(b) Twenty thousand dollars ($20,000),

(c) The sum of (i) the contributions of the Bank (or funds attributable thereto) which would have been applied to provide benefits for such Employee under the Plan if it had been terminated on the day before the effective date of such amendment and (ii) an amount computed by multiplying the number of years for which the current costs of the Plan after that date are met by (x) twenty per cent (20%) or his Annual Salary, or (y) ten thousand dollars ($10,000) whichever is smaller; or

(d) An amount equal to the Actuarial Equivalent, as of the date of Plan termination or the date such benefit of $1,602.27, payable in the form of a life annuity at age 65. Such dollar amount shall be subject to adjustment in accordance with the Pension Benefit Guaranty Corporation (PBCC) Regulations pursuant to ERISA Section 4022. If, however, such Member owns more than 10% of either the voting stock or all stock of the Bank, the limitation under this subsection (d) shall not exceed the present value of the

benefits guaranteed for such Member under ERISA Section 4022 as of the Plan termination date, or, if the Plan has not been terminated, as of the date the benefit commences but calculated as if the Plan had been terminated as of such date. Actuarial Equivalent as stated herein shall be determined according to the PBGC regulations 29 CFR Part 2619.

The foregoing limitations shall not restrict the current payment of full retirement benefits to any Member or his Beneficiary as long as any such event shall not have occurred. Any fund recovered as a result of this provisions shall be used proportionately to provide additional benefits for all other Member's of the Plan.

If the Retirement Income to any such Member became payable within ten (10) years of the effective date of any amendment increasing his Retirement Income, his Retirement Income payments shall be restricted as provided above until the Plan has been in effect ten (10) years after such effective date, provided that the full current costs of the Plan have then been funded. If the full current costs of the Plan have not been funded at such time, the restriction will continue to apply until the full current costs of the Plan have been funded for the first time. These restrictions may be exceeded if the Bank contributions are used to provide any such Member upon retirement with level amounts of annuity under an optional form of payment, if the level amount of annuity under such optional form of payment is not greater than the level amount of annuity under the normal form of Retirement Income payment, but only (a) if the current costs of the Plan have been met, or (b) if the aggregate of such payments in excess of the restricted amount for all such retired Members does not exceed the aggregate Bank contributions already made to the Plan for the current year.

SECTION XVI

General Provisions

(1) Participation in this Plan shall not give to any person the right to be retained in the employ of the Bank nor upon dismissal to have any rights in the Fund other than as described in this Plan.

(2) The right of any Member to receive any benefit payable to him under the provisions of this Plan shall not be subject to alienation or assignment and if such Member shall attempt to assign, transfer or dispose of such right or if such right be subject to attachment, execution, garnishment, sequestration or other legal, equitable or other profess, it shall ipso facto, pass and be transferred to such one or more other persons as may be appointed by the Committee from among the beneficiary, if any, theretofore designated by such Member and/or the spouse or blood relatives of the Member and in such shares and proportions as the Committee may appoint. Any appointment so made by the Committee may be revoked by it at any time and further appointment made by it which, if the Committee so determines, may name this Member.

Notwithstanding the above, the Committee shall direct the Trustees to comply with a Qualified Domestic Relations Order provided such order does not require a form of benefit not otherwise provided under the Plan, or require increased benefits, or require the payment of benefits to an Alternate Payee (as described below) which are required to be paid to another Alternate Payee under a previous Qualified Domestic Relations Order. Payment's in compliance with a Qualified Domestic Relations Order may commence, in the case of a Member who has not separated from service no earlier than the first day of the month coincident with or next following the date the Member attains age 55, based on the Actuarial Equivalent of the Member's Accrued Benefit on the date payments are to begin.

For purposes of this Section an Alternate Payee shall mean a spouse, former spouse, child or dependent of the Member who is recognized by a Qualified Domestic Relations Order as having the right to receive all or a portion of, the benefits payable under the Plan to the Member.

To the extent provided in a Qualified Domestic Relations Order, a former spouse shall be considered a spouse for the purposes of Section VIII. The Committee shall notify each Member and any Alternate Payee of the receipt of such orders, Plan procedures for determining the qualified status of domestic relation orders and administration of such distributions. Such procedures including, if appropriate, the segregation of Plan assets necessary to satisfy the Qualified Domestic Relations Order during the pendency of the Committee determination shall be in accordance with reasonable and uniform policies established by the Committee, in accordance with the Internal Revenue Code and applicable regulations.

(3) The Bank and the Trustee shall not consent to, or be a party to, any merger or consolidation with another plan, or to a transfer of assets or liabilities to another plan, unless immediately after the merger, consolidation or transfer, the surviving plan provides each Member a benefit equal to or greater than the benefit each Member would have received immediately before such merger, consolidation or transfer.

(4) Except insofar as Federal legislation or applicable regulations shall govern, the provisions and the validity and construction of this Plan shall be subject to and governed by the laws of the State of New Jersey.

(5) If any provision of this plan is held invalid or unenforceable, such validity or unenforcibility shall not affect any other provision; and this Plan shall be construed and enforced as if such provision had not been included.

(6) This Plan and the appended Declaration of Trust may be executed in any number of counterparts, each of which shall

be deemed an original, all of which shall constitute one and the same instrument, sufficiently evidenced by any one thereof.

(7) This Plan shall be binding upon and inure to the benefit of the Bank and its successors, the Trustee and its successors in office, the Committee as from time to time constituted, and the Members, beneficiaries and contingent annuitants, in accordance with, and subject to the limitations set forth in, the express provisions hereof.

(8) All notices, applications, elections, instructions, authorizations, approvals, resolutions, certificates, receipts, and other communications and instruments shall be in writing and shall be valid and sufficient if in the following form:

(a) If the Bank or the Trustee, the same shall be executed by an officer;

(b) If by the Committee, the same shall be executed by its Chairman or Vice Chairman, Secretary or Assistant Secretary, or a majority of the members acting at the time, and;

(c) If by an Employee or Member, beneficiary or contingent annuitant, the same shall be executed by him or an attorney in fact specially authorized in writing.

(9) All notices and other instruments specified in Paragraph (8) above shall be validly and sufficiently given if served personally upon or mailed to the person addressed or affected thereby, and, if mailed, shall be presumed to have been received on the day following the date of mailing. If mailed, the same shall be addressed as follows:

(a) If to the Bank, the Insurance Company or the Trustee, at its main office in Newark, New Jersey;

(b) If to the Committee, in care of the Bank, at said office;

(c) If to an Employee. Member, beneficiary or contingent annuitant, at his last address shown on the records of the Bank, the Insurance Company, the Trustee or the Committee, whichever shall be the sender.

SECTION XVII

Top-Heavy Limitations

1. When used in this Article the following terms shall have the following meaning:

(a) Aggregation Group Plan

Each tax qualified plan maintained by an Employer.

(1) in which a Key Employee is a Participant; and

(2) which enables any plan described in (a) in which a Key Employee participates to meet the requirements of Section 401(a)(4) and 410 of the Internal Revenue Code;

(3) which the Employer chooses to include in the Aggregation Group as long as such group would continue to meet the requirements of Section 401(a)(4) and 410 with such plan being taken into account.

(b) Cumulative Accrued Benefit

For a Participant as of the Determination Date for a Plan Year, the sum of (1) the aggregate distributions made from the Aggregation Group Plans with respect to a Participant during the five Plan Years immediately preceding such Determination Date, (2) the Actuarial Equivalent present value of the Cumulative Accrued Benefits of that Participant in

all defined benefit Aggregation Group Plans and (3) the aggregate value of the accounts of that Participant under all Aggregation Group Plans. For purposes of determining the Cumulative Accrued Benefits of that Participant any rollover contribution or plan transfer made to an Aggregation Group Plan after December 31, 1983 shall be disregarded to the maximum extent permitted by the Internal Revenue Code and regulations if it is (1) initiated by the Participant and (2) not made from an Aggregation Group Plan.

(c) Determination Date

The last day of the preceding Plan Year

(d) Employer

The bank or any other employer aggregated with the Bank under Section 414(b), (c) or (m) of the Internal Revenue Code.

(e) High-5 Year Average Salary

An Employee's average annual Compensation for the five consecutive years of Credited Service during which his Compensation was highest.

(f) Key Employee

Any Participant who at any time during the Plan Year or any of the four preceding Play Years was, or would be considered a "key employee" under Section 416(i) of the Internal Revenue Code and the regulations thereunder.

(g) Participant

An Employee including an Employee in any Aggregation Group Plan.

(h) Top-Heavy

For a Plan Year that the aggregate Cumulative Accrued Benefits of Key Employees exceed 60% of the aggregate Cumulative Accrued Benefits of all Participants as of the Determination Date (90% if the Plan is to be characterized as "Super Top-Heavy"). For this purpose, the Cumulative Accrued Benefit of (1) any former Key Employee who is not a Key Employee as of such Determination Date and (2) with respect to Plan Years commencing after December 31, 1984, any Participant who has received no compensation from any Employer during the five Plan years immediately preceding such Determination Date shall be disregarded in accordance with the Internal Revenue Code and the regulations thereunder.

(i) Valuation Date

The same day as the Determination Date.

2. Top-Heavy Restrictions

Notwithstanding any other provisions of the Plan if the Plan is Top-Heavy or Super Top-Heavy for a Plan commencing after December 31, 1983, then the following provisions all apply, but only to the extent required by the Internal Revenue Code and the regulations thereunder:

(a) Only the first $200,000 of compensation may be taken into account under the Plan; provided, however, that said $200,000 limitation shall be adjusted for increases in the cost-of-living in accordance with the Code and the Regulations.

(b) The Accrued Benefit for each Employee other than the Key Employee who was credited with a full or partial year of Credited Service for the Super Top-

Heavy Plan Year shall be no less than the product of 2% of the Employee's High-5 Year Average Salary multiplied by the number of years that Employee's Credited Service is in excess of ten (10) years of Credited Service, but excluding all years of Credited Service (1) commencing before January 1, 1984 and (2) with respect to any Plan Year ending in such year during which the Plan was not Top-Heavy or Super Top-Heavy; provided, however, that in determining whether the requirements of this Article XVII, Section 2 met appropriate adjustments in accordance with the Internal Revenue Code and the regulations thereunder shall be made for the benefits or contributions provided each Employee other than a Key Employee under any other tax-qualified plan maintained by an Employer;

(c) Any Employee's applicable vesting percentage shall be determined in accordance with the following vesting schedule:

VESTING SCHEDULE

Full Years of Vesting Service	Percentage
Less than 2 Years	0%
More than 2 but less than 3 Years	20%
More than 3 but less than 4 Years	40%
More than 4 but less than 5 Years	60%
More than 5 but less than 6 Years	80%
More than 6 Years	100%

(d) If an Employee's vested benefit is no longer determined under Section XVII 2(c) for a Plan Year commencing after December 31, 1984, then for purposes of the Internal Revenue Code and the regulations thereunder, such change shall be considered an amendment to the Plan's vesting schedule. Any employee with five (5) or more years of Vesting

Service when the regular schedule goes back into effect may elect to stay under this special vesting schedule.

(e) For any Top-Heavy Plan Year the requirements of this Section shall be satisfied by making appropriate adjustments to the defined benefit plan fraction and the defined contribution plan fraction under Section 415(e) of the Internal Revenue Code to reflect the additional restriction imposed by Section 416(h)(1) of the Internal Revenue Code and the regulations thereunder. The sum of the defined benefit and defined contribution plan fractions shall not exceed 1.0.

(f) For any Super Top-Heavy Plan Year the requirements of this Section shall be satisfied by using 1.0 instead of 1.25 in the denominators of the defined benefit and defined contribution plan fractions.

The foregoing is the Retirement Plan of the Howard Savings Bank, as revised as of December 1, 1985.

IN WITNESS WHEREOF, the Bank and the Trustee have caused these presents to be executed and their respective corporate seals to be hereunto affixed and attested by their respective corporate officers thereunto duly authorized, all as of the date aforesaid.

THE HOWARD SAVINGS BANK

By [ILLEGIBLE]
Chairman of the Board & C.E.O.

THE HOWARD SAVINGS BANK
(As Trustee)

By [ILLEGIBLE]
Vice President & Senior
Trust Officer

ATTEST:
(CORPORATE SEAL)

By BRENDA WALKER
Brenda Walker
Assistant Secretary

ATTEST:
(CORPORATE SEAL)

By [ILLEGIBLE]
Senior Trust Officer

Certification

This is to certify that this is a correct and complete copy of The Retirement Plan for The Howard Savings Bank.

[ILLEGIBLE]
Chairman of the Board and C.E.O.

Amendment No. 1
The Howard Savings Bank
Retirement Plan
(As Restated December 1, 1985)

Whereas, The Howard Savings Bank adopted the restated retirement plan (hereinafter the "Plan") on _____ said Plan to be effective on December 1, 1985; and

Whereas, the Plan is now amended by the adoption of this Amendment No. 1 as herein set forth:

1. Section I (12) is hereby amended by adding the following thereto:

   Employee shall not include any employee of the Bank whose wages and working conditions are determined pursuant to a collective bargaining agreement if there is evidence that retirement benefits were the subject of good faith bargaining in association with such collective bargaining agreement.

2. Section IV (6) is hereby added to the Plan as follows:

   (6) In the event that any Participant is or becomes a member of a union or other collective bargaining unit that enters into a collective bargaining agreement with the Bank and has, as a part of its negotiations with the Bank, bargained in good faith concerning a pension plan which is adopted, such Participant will cease to participate in this Plan as of the last day of the month preceding the date his participation in said union or other collective bargaining unit becomes effective.

This Amendment No. 1 is hereby effective as of December 1, 1986. IN WITNESS WHEREOF, the Bank and the Trustee have caused these presents to be executed and their respective corporate seals to be hereunto affixed and attested by their respective corporate officers thereunto duly authorized, all as of the date aforesaid.

The Howard Savings Bank

By _____
Chairman of the Board & C.E.O.

The Howard Savings Bank
(As Trustee)

By _____
Vice President & Senior Trust Officer

Attest:
(Corporate Seal)

_____
Vice President & Secretary

Attest:
(Corporate Seal)

_____
Senior Trust Officer

BOARD OF DIRECTORS

November 23, 1987

THE HOWARD SAVINGS BANK—RETIREMENT PLAN

WHEREAS, The Howard Savings Bank (the "Bank") adopted its Amended and Restated Retirement Plan (the "Plan") on July 28, 1986 to be effective as of December 1, 1985; and

WHEREAS, said Plan was submitted for approval to The Internal Revenue Service on August 14, 1986; and

WHEREAS, in response to a request made by The Internal Revenue Service to conform certain technical language of the Plan to the requirements of The Internal Revenue Code of 1954 as amended by the Tax Equity and Fiscal Responsibility Act of 1982, the Deficit Reduction Act of 1984 and the Retirement Equity Act of 1984, Amendment No. 2 to the Plan has been prepared, and is attached hereto.

NOW, THEREFORE, BE IT RESOLVED, that the draft of Amendment No. 2 to The Retirement Plan of The Howard Savings Bank, submitted to this meeting is hereby approved, subject to Internal Revenue Service approval as to continued qualification of the Plan and that Amendment No. 2 is hereby adopted to become effective December 1, 1985;

FURTHER RESOLVED, that the proper Officers of the Bank are hereby authorized to take all such action, to incur such expenditures and to execute such written instruments as they shall deem necessary or advisable in order to carry into effect the purposes and intent of these resolutions, including, without limitation, such action as they shall deem necessary or advisable in order to obtain a ruling from the Internal Revenue Service that the Amended and Restated Plan continues to meet the requirements of Section 401 of the Internal Revenue Code of 1954, as amended.

NOV. 23, 1987
AUTHORIZED
BY THE
BOARD OF DIRECTORS

By: HILDA COSTANZA
SECRETARY

THE HOWARD SAVINGS BANK—RETIREMENT PLAN

WHEREAS, The Howard Savings Bank (the "Bank") adopted its Amended and Restated Retirement Plan (the "Plan") on July 28, 1986, to be effective as of December 1, 1985; and

WHEREAS, the Bank has acquired and may acquire in the future stock of other corporations and has, in addition, created subsidiaries (the "Subsidiaries"); and

WHEREAS, the employees of certain Subsidiaries are presently eligible to participate in the Plan; and

WHEREAS, the Bank desires to permit other Subsidiaries to adopt the Plan; and

WHEREAS, the Howard Federal Savings, F.A. (the "Savings") has been acquired by the Bank and Savings currently maintains the Howard Federal Savings Defined Benefit Plan ("Savings Plan"); and

WHEREAS, the Board of Directors believes it to be in the best interest of the Bank and the Subsidiaries that if a reduction in benefits of an employee is required by the provisions of Section 415 of the Internal Revenue Code, such reduction shall first be applied against the benefits under the Plan; and

WHEREAS, the Plan must be amended to implement the purposes and intent of the foregoing.

NOW, THEREFORE, BE IT RESOLVED, that the draft of "Amendment Number 3 to the Plan" submitted to this meeting is hereby approved; and

FURTHER RESOLVED, that the effective date of said Amendment Number 3 shall be December 1, 1987; and

FURTHER RESOLVED, that the Board of Directors confirms and ratifies that the Howard Insurance Group, Inc., Howard Relocation Group, Inc., and John Howard Discount Brokerage, Inc. have participated in the Plan since December 1, 1985, June 18, 1984 and June 1, 1986, respectively; and that these entities will continue to participate in the Plan; and

FURTHER RESOLVED, that effective August 3, 1987 in the case of *Morris & Gillette, Inc.* and December 1, 1987 in the case of Mortgage Services of America, those entities shall be eligible to adopt the Plan; and

FURTHER RESOLVED, that effective December 1, 1987, the Savings Plan shall be merged into the Plan without a loss of benefits to the employees of Savings; and

FURTHER RESOLVED, that all assets of the Savings Plan shall be transferred from the Savings Plan Trust to the Plan Trust; and

FURTHER RESOLVED, that the proper officers of the Bank are, and each of them is, hereby authorized to take all such action, to incur such expenditures and to execute such written instruments as they shall deem necessary or advisable in order to implement the purposes and intent of the foregoing resolution, including, without limitation, such action as they shall deem necessary or advisable.

NOV. 23, 1987
AUTHORIZED
BY THE
BOARD OF DIRECTORS

By: HILDA COSTANZA
SECRETARY

DEC. 18, 1989
AUTHORIZED
BY THE
BOARD OF DIRECTORS

By: BRENDA J. WALKER
ASSISTANT SECRETARY

RESOLUTIONS

WHEREAS, The Howard Savings Bank (the "Bank") adopted its Amended and Restated Retirement Plan (the "Plan") on July 28, 1986, to be effective as of December 1, 1985; and

WHEREAS, it has been determined that the Plan must be amended to conform to the requirements of the Internal Revenue Code of 1986, as amended by the Tax Reform Act of 1986, the Omnibus Budget Reconciliation Act of 1987, and the Technical and Miscellaneous Revenue Act of 1988 (the "Code"); and

WHEREAS, the Internal Revenue Service has issued rulings, regulations, notices and other guidance interpreting the pension and profit sharing provisions set forth in the Code; and

WHEREAS, amendments reflecting the changes required under the Code must be formally adopted before the first plan year beginning after December 31, 1988 or such later date as may be determined by the Internal Revenue Service; and

WHEREAS, it has been determined that the Plan should be amended further to make certain other administrative changes therein.

NOW, THEREFORE, BE IT RESOLVED, that the amendments to the Plan, as set forth in materials heretofore distributed to the directors and attached to these minutes, are hereby adopted; and

FURTHER RESOLVED, that the proper officers of the Bank, in conjunction with the Committee administering the Plan, are hereby authorized to make such further amendments to the Plan as may be necessary to have it comply with the Code; and

FURTHER RESOLVED, that the Committee is hereby authorized to make any other changes in the administration of the Plan as may be required or which the Committee may deem necessary; and

FURTHER RESOLVED, that the proper officers of the Bank be, and they hereby are, authorized and directed to take all such action, to incur such expenditures and to execute such written instruments as they shall deem necessary or advisable in order to carry into effect the purposes and intent of the foregoing resolutions, including, without limitation, such action as they shall deem necessary or advisable in order to obtain a ruling from the Internal Revenue Service that the Plan continues to meet the requirements of Section 401 of the Code.

THE HOWARD SAVINGS BANK—HUMAN RESOURCE DEPARTMENT

RETIREMENT PLAN—SUMMARY OF PROPOSED AMENDMENTS

ITEM	CURRENT SITUATION	PROPOSED AMENDMENT
1. Vesting Schedule —Minimum vesting allowed has been reduced to either 5 year cliff vesting or 3-7 graded vesting.	Participants are 100% vested in accrued benefit after 10 years of service.	Participants are 100% vested in accrued benefit after 5 years of service.
Special Vesting Credit —Purchase agreement stipulated that CAI employees at the time of purchase who continue employment for 2 years with the Howard will be given vesting credit for all their prior service with CAI.	Subsidiary employees receive vesting credit from date company is acquired.	Adopt special provision for CAI employees.

2. Minimum Participation Rules —TRA '86 requires any individual "benefit structure" cover at least 20 employee participants	HSB maintains 2 different "benefits structures", employees hired prior to 1/1/82 receive benefit of 2% of Average Annual Salary times credited service; whereas employees hired on or after 1/1/82 receive benefit of 1.5% of Average Annual Salary times credited service..	Currently not a problem, will require action when less than 20 employees are still eligible for 2% of Average Annual Salary formula.
3. $200,000 Limit on Compensation —on employee's eligible earnings for calculating benefits/contributions	Individual employee's benefit is calculated based on employee's actual base salary (no maximum limit) as of December 1 of highest 5 consecutive of 10 years preceding retirement date.	Adopt $200,000 maximum limit on employee's earnings.
4. Post Normal Retirement Accrual	Active employee does not accrue benefits after reaching normal retirement date.	Active employee will continue to accrue benefits until actual retirement date.

ITEM	CURRENT SITUATION	PROPOSED AMENDMENT
5. Normal Retirement Date	Normal Retirement Date is defined to be the later of age 65 or the completion of 10 years of service.	Normal Retirement Date is defined to be the later of age 65 or the completion of 5 years of service.
6. Participation Eligibility	Employee becomes a member of the Plan at the later of attainment of age 21 or the completion of one year of service, provided the employee is not within 5 years of Normal Retirement Date.	Employee becomes a member of the Plan at the later of attainment of age 21 or the completion of one year of service.
7. Supplemental Pensions	Supplemental pensions paid to retirees as a cost of living adjustment are paid by Bank.	Amend Plan to pay current Supplemental pensions from the Retirement Plan Trust. Do not include automatic escalator; i.e., future increases would continue to be approved on an ad hoc basis requiring annual approval by Board.

8. Payment of Expenses from Trust

Fund may pay administrative expenses of Plan if the bank fails to pay.

At the direction of the Retirement Committee the Trust Fund will pay expenses of the Plan.

These expenses include fees for actuarial valuation and PBGC premium.

RESOLUTIONS

WHEREAS, The Howard Savings Bank (the "Bank") maintains for its employees The Howard Savings Bank Retirement Plan (the "Retirement Plan"); and

WHEREAS, the Bank wishes to encourage the early retirement of certain employees aged 55 or older; and

WHEREAS, the Bank desires to amend the Retirement Plan to provide for additional retirement benefits for those qualified employees who have completed a minimum term of service and who retire during a specified period of time; and

WHEREAS, determined that it is in the best interest of the Bank to amend the Retirement Plan to include such additional retirement benefits.

NOW, THEREFORE, BE IT RESOLVED, that the amendments to the Retirement Plan, as set forth in materials heretofore distributed to the directors and summarized on Exhibits attached to these minutes, are hereby adopted; and

FURTHER RESOLVED, that the proper officers of the Bank, in conjunction with the committee administering the Retirement Plan (the "Committee"), are hereby authorized to make such further amendments to the Retirement Plan as may be necessary for the Retirement Plan to comply with Section 401 of the Internal Revenue Code of 1986, as amended (the "Code"); and

FURTHER RESOLVED, that the Committee is hereby authorized to make any other changes in the administration of the Retirement Plan as may be required or which the Committee may deem necessary; and

FURTHER RESOLVED, that the proper officers of the Bank be, and they hereby are, authorized and directed to take such further action, to incur such expenditures and to execute such written instruments as they shall deem necessary or advisable in order to carry into effect the purposes and intent of the foregoing resolutions, including without limitation such

action as they shall deem necessary or advisable in order to obtain a ruling from the Internal Revenue Service that the Retirement Plan continues to meet the requirements of Section 401 of the Code.

JUN 25, 19__
AUTHORIZED
BY THE
BOARD OF DIRECTORS

By: BRENDA J. WALKER

June 20, 1990

Board of Directors
The Howard Savings Bank

Gentlemen and Madam:

Enclosed for your approval is a resolution to amend The Howard Savings Bank Retirement Plan to provide enhanced benefits for active employees who have attained age 55 and completed at least 5 years of service as of June 30, 1990.

Eligible employees who elect to retire will receive pension benefits calculated as if the employee has additional 5 years of service and was 5 years older in age; in addition, the employee will receive a lump sum payment equal to one week's pay for each two years of service.

Due to the current over funded status of the Plan, this amendment is not expected to cause the Bank to make any additional contributions to the Plan during 1990 or 1991.

As you are aware, the proposed amendment is part of three step action plan to reduce the workforce thereby reducing operating expenses. The three steps include:

1. Staff Reductions—The Task Force recommended the elimination of 36 positions via consolidating functions and reallocating responsibilities.

2. Early Retirement—To generate favorable turnover, the above enhanced retirement benefits were offered. In addition, certain employees who did not meet the specific age requirement were offered the above enhanced pensions paid directly by the Bank. An additional 25 positions were identified where replacements were not requested.

3. Staff Levels—Departments will be required to operate at staff levels no greater than yearend 1989 reduced by the positions eliminated in the above two items.

The base salary savings minus the operating expense of items #1 and #2 will be $775,000 in 1990 and $1,905,000 in 1991. We expect the actual savings will be higher, the Financial Analysis Department is currently in the process of forecasting the affect of the three step on 1990.

Respectfully submitted,

Leo J. Rogers, Jr.

EXHIBIT A

RETIREMENT PLAN
OF THE HOWARD SAVINGS BANK

A Summary of Proposed Early Retirement Benefits.

In order to encourage the early retirement of certain employees aged 55 or older, the Bank desires to amend the Retirement Plan to offer additional retirement benefits Commencing on July 1, 1990 to all employees aged 55 or older (i) who are below the level of Executive Vice President, (ii) who have completed a minimum of 5 years of service with the Bank and (iii) who retire during the period commencing on April 23, 1990 and ending on June 30, 1990 ("Qualified Employees"). The additional retirement benefits are as follows:

(1) Qualified Employees shall be credited with an additional five years of service and an additional 5 years of age in calculating their retirement benefit; and

(2) Qualified Employees shall be paid a lump sum payment in an amount equal to one week's pay for each 2 complete years of service.

THE HOWARD SAVINGS BANK—HUMAN RESOURCES DEPARTMENT

SUMMARY OF EXPENSE AND ESTIMATED SAVINGS

TASK FORCE RECOMMENDATIONS AND RETIREMENT OFFERINGS

	POSITIONS	1990 PROGRAM OPERATING EXPENSE	1990 BASE SALARY SAVINGS	1990 NET SAVINGS	1991 PROGRAM OPERATING EXPENSE	1991 BASE SALARY SAVINGS	1991 NET SAVINGS
Task Force eliminated positions							
A Employees Retiring Under General Offer	9	$0	$175,455	$175,455	$0	$401,810	$401,810
B. Employees Retiring Under Special Offer	8	$132,915	$128,986	($3,929)	$119,652	$374,444	$254,792
C. Employees Re-Assigned	19	$0	$373,812	$373,812	$0	$746,271	$746,271
Positions Eliminated	36	$132,915	$678,253	$545,338	$119,652	$1,522,525	$1,402,873
Early Retirement Offerings—No Replacement Requested							
A Employees Retiring Under General Offer	23	$0	$233,564	$233,564	$0	$467,128	$467,128
B. Employees Retiring Under Special Offer	2	$36,172	$33,045	($3,127)	$30,758	$66,090	$35,332
Positions Eliminated	25	$36,172	$266,609	$230,437	$30,758	$533,218	$502,460
Total Task Force and Offering Eliminations	61	$169,087	$944,862	$775,775	$150,410	$2,055,743	$1,905,333
Early Retirements—Replacements Requested	51	0	?	?	0	?	?

Savings will occur due to delay in hiring, costs and savings have not been quantified.

BOARD OF DIRECTORS—H S B

Mr. Thorne submitted a proposal, which had been approved by the Compensation Committee of the Board at its meeting held on November 12, 1991, to amend the Bank's Retirement Plan to create a single benefit formula for all employees; to integrate the Retirement Plan with Social Security and to discontinue the present early retirement incentives. These amendments were reviewed with and recommended by the Bank's consultant, Towers, Perrin. It was moved by Dr. Fenster, seconded by Mr. Marfuggi, and unanimously agreed to approve the foregoing amendments to the Bank's Retirement Plan and to authorize the Bank's officers to take the steps necessary to implement those changes.

NOV 25, 1991
[ILLEGIBLE]

BRENDA J. WALKER

The Howard Savings Bank
Retirement Plan

Summary Plan Description
September 19, 1995

IMPORTANT CORRECTIONS

The following corrections to the enclosed Summary Plan Description (SPD) should be included as part of SPD dated September 19, 1995. All changes are underlined in this correction.

Page 3 - "How You Become Eligible"- Replace last paragraph as follows:

You receive one year of Eligibility Service when you complete 1,000 hours of service during your first year with the Bank or in any Plan Year (December 1 to November 30) after that. No new participants are admitted to the Plan after October 2, 1992.

Page 7 - "Credited Service", - Replace paragraph as follows:

Credited Service is the number of months of service you complete with the Bank starting on your date of employment. You can receive up to a maximum of 360 months (30 years) of Credit Service if you were first employed before January 1, 1982, and up to a maximum of 480 months (40 years) of Credited Service if you were first employed on or after January 1,1982. If you complete 1,820 or more hours of service during the Plan Year, you receive credit for 12 months of service. If you complete between 1,000 and 1,820 hours of service, you receive credit for one month's service for each 151 hours of service during the Plan Year, you receive no credit for service unless you retire or terminate during that year, and

have completed at least 1,000 hours of service during the previous year.

Page 7 - "You normal retirement benefit to February 1992" - Replace first sentence as follows:

Regular Benefit — You can earn a portion of your retirement benefit each year you have credited service in the Plan.

Page 8 and 9 - "social Security Covered Compensation" - Replace paragraph as follows:

Social Security Covered Compensation — which is the 35-year average of the maximum earnings which are subject to Social Security taxes. Social Security covered compensation changes from year to year. The 35-year average for the 1991 Plan year (December 1, 1991 – November 30, 1992) is $19,728.

Page 10 - Continuation of "Your Early Retirement Benefit" - Replace paragraph as follows:

However, the Bank provides an important benefit to career employees. This reduction does not take effect if, at termination, you have a certain number of years of vesting service, given your age, as shown:

Page 11 - "If you leave the bank before retiring" - Replace paragraph as follows:

Pension payments generally begin the first day of the month after your 65th birthday. However, you may choose to receive your pension as early as the first day of the month after your 55th birthday, if you have 10 years of service, with your benefit reduced actuarially to reflect a longer payment period.

RETIREMENT PLAN

EMPLOYEE BENEFITS

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Planning Future Financial Security Today

Planning for retirement is a process that begins long before the event takes place. Before retirement, it's important to consider how you can maintain the life-style you have during active employment once you are no longer working. That's why the Bank provides a Retirement Plan that helps you look to the future during your career with the Bank. Your financial security during retirement is also supplemented by the Bank's Incentive and Investment Plan as well as Social Security.

Generally speaking, the Plan's benefits are based on what you earn throughout your employment and your service with the Bank. Although normal retirement begins at age 65 (with 10 years of vesting service)*, in certain circumstances you can retire earlier or later than that age, or you may be entitled to benefits even if you leave the Bank before you retire.

The Plan also provides special protection to your spouse if you have earned a right to your retirement benefit and should die before you retire.

Before retirement benefits from the Plan begin, you can choose from several forms of payment. A monthly benefit may be paid for your lifetime only, or you can choose to have a portion of your benefit continued to a beneficiary after your death. The amount of the monthly benefit you receive depends on your choice.

This chapter is a summary of the Plan's most important provisions. While it should answer most of your questions about the Plan, it does not provide all the details. These may be found in the official plan document. In the event of discrepancies, the plan document prevails. If you would like more information, contact the Benefits Representative in the Personnel Department.

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* Individuals who participated in the Plan prior to 12/1/85 are automatically vested at age 55.

How You Become Eligible

You are eligible to participate in the Retirement Plan provided that you:

- complete one year of Eligibility Service
- are at least age 21, and
- are not within 5 years of normal retirement at the time of hire

You receive a year of Eligibility Service when you complete 1,000 hours of service during your first year of employment, or during any Plan Year (December 1 – November 30) thereafter.

Hours of Service

Hours of service include each hour you work for which you are paid by the Bank. In addition, hours of service include those during which you do not work, such as vacations, holidays, illness, layoff, jury duty, military duty or approved leaves of absence. However, the Bank is not required to credit you with more than 501 hours of service for such periods.

A one-year break-in-service occurs when you complete less than 501 hours of service during any Plan Year following the one in which you were hired. However, you will not incur a break-in-service when you are on an approved leave of absence.

Cost of the Plan

The Bank pays the full cost of the Retirement Plan. You are not required to make any contributions. In addition, the Bank contributes to Social Security on your behalf during your career.

When You Can Retire

There are three different types of retirement:

- normal retirement—at age 65 with 10 years of vesting service
- early retirement—as early as age 55 with 10 years of vesting service,* and
- deferred retirement—after age 65

Normal Retirement

Normal retirement is generally age 65, provided you have completed 10 years of vesting service. However, if you participated in the Plan prior to 12/1/85, normal retirement is the first of the month that coincides with or follows your 65th birthday, regardless of your years of service. If you were hired prior to December 1, 1952, please contact the Personnel Department for more information. If you choose to retire at normal retirement age, payment of your retirement benefit will begin on the first of the following month.

Early Retirement

You become eligible for early retirement when you reach age 55 and complete 10 years of vesting service. However, if you participated in the Plan prior to 12/1/85, you are automatically vested and eligible for early retirement at age 55—regardless of your years of vesting service. You can begin to receive retirement benefits on the first of the month coincident with your retirement, or delay receipt of benefits until the first day of any following month.

When you choose early retirement and do not defer payment of benefits until normal retirement age, you collect monthly pension benefits longer than you would if you retired at age 65. For this reason, the monthly payment you receive if you

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* Individuals who participated in the Plan prior to 12/1/85 are automatically vested at age 55—regardless of their years of vesting service.

retire before age 65 is reduced by a certain percentage to reflect the longer payment period.

You may elect early retirement by filing a written application at least three months prior to your early retirement date.

Deferred Retirement

Some employees prefer to work beyond normal retirement. You will receive retirement benefits on the first of the month coincident with your retirement from full-time employment. If you defer your retirement, your monthly payment will be the same amount you would have received had you retired upon reaching your normal retirement date.

How Your Retirement Benefit Is Calculated

Your annual retirement benefit is based on:

- Annual Salary, and
- Months of Service Credited

In addition, the Plan provides for a minimum benefit that you would receive if it is greater than the benefit provided under the regular retirement formula. This minimum benefit is based on:

- Average Annual Salary, and
- Credited Service.

Here is a definition of the terms used in the formula calculating your benefit.

Under the *regular retirement formula*, the benefit payable is based on the following:

Annual Salary

Annual salary (December 1 – November 30) is your basic salary. This does not include overtime pay, bonuses and any other special pay.

Months of Service Credited

Each Plan Year you complete 1,000 hours of service or more, you earn months of credited service. If you complete 1,820 or more hours of service, you receive credit for 12 months of service. If you complete between 1,000 and 1,820 hours of service, you receive credit for one month's service for each 151 hours of service you complete. If you complete less than 1,000 hours of service during the Plan Year, you receive no credit for service unless you retire or terminate during that year, and have completed at least 1,000 hours of service during the previous year

For example, suppose you worked 1,820 hours in 1985 and retired in 1986 after completing 302 hours of service. In this case, you would have received credit for two months of service for 1986 (302/151 = 2).

The *minimum benefit* payable by the Plan is based on the following:

Average Annual Salary

Average Annual Salary is the average of your base salary (December 1 – November 30) for the 5 consecutive highest-paying years during the 10 years prior to the year in which retirement, early retirement or death occurs--whichever is earliest. Base salary does not include overtime pay, bonuses or any other special pay.

Credited Service

Credited Service is the number of months of service you complete with the Bank, starting on your date of employment. You can receive up to a maximum of 360 months (30 years) of Credited Service if you were employed before January 1, 1982, and up to a maximum of 480 months (40 years) of Credited Service if you were employed after January 1, 1982. If you complete less than 1,000 hours of service during the Plan Year, you receive no credit for service unless you retire

or terminate during that year, having completed at least 1,000 hours of service during the previous year.

Your Normal Retirement Benefit

You earn a portion of your retirement benefit each year you participate in the Plan. The normal retirement benefit you earn each year will be calculated using the following formula.*

- 2-1/2% of your Annual Salary for the Plan Year—*provided you complete at least 1,820 hours of service*

or

- 2-1/2% of your Annual Salary for the Plan Year times Months of Service Credited divided by 12—*if you complete less than 1,820 but at least 1,000 hours of service*

Minimum Benefits

The minimum benefit payable under the Plan is calculated as follows:

- If you were employed before January 1, 1982, the minimum benefit is: 2% of your Average Annual Salary times your years and months of Credited Service
- If you were employed on or after January 1, 1982, the minimum benefit is: 1-1/2% of your Average Annual Salary times your years and months of Credited Service

An Example

John became a member of the Plan on December 1, 1977. He has 10 years and 11 months of service when he retires at age 65 on November 1, 1987. Here's how John's annual retirement benefits is determined.

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* Note that any benefit earned prior to November 30, 1976 is calculated based on the formula in effect at that time. If applicable, this amount is added to the benefit earned under the formula described here when your total retirement benefit is calculated.

Under the *regular retirement formula*, John has earned a portion of his retirement benefit during each year of employment. It's assumed that John has worked 1,820 hours each year prior to his year of retirement. Here is the benefit earned each year, based on his Annual Salary.

Plan Year	Annual Salary	Benefit Accrued
1977	$16,000	$ 400.00
1978	$16,500	$ 412.50
1979	$17,000	$ 425.00
1980	$17,500	$ 437.50
1981	$18,000	$ 450.00
1982	$18,500	$ 462.50
1983	$19,000	$ 475.00
1984	$19,500	$ 487.50
1985	$20,000	$ 500.00
1986	$21,000	$ 525.00
Total Benefit Accrued Through November 30, 1986 =		**$4,575.00**

During the year he retires, John's annual salary is $22,000, and he works 1,661 hours. So, his Months of Credited Service equals (1,661 divided by 151 =) 11 months for the year in which he retires.

Under the regular retirement formula, John's benefit is calculated as follows for the year in which he retires:

$2\frac{1}{2}\%$ (.025) × $22,000 × 11/12 = $ 504.17

To determine John's benefit under the regular retirement formula, the benefits he has earned for each year are combined

Annual benefit earned through 1986 =	$4,575.00
Annual benefit earned in 1987 =	+$ 504.17
Annual retirement benefit earned under regular retirement formula	$5,079.17

Now this annual benefit is compared to the *minimum benefit* provided by the Plan. Because John was employed prior to January 1, 1982, his minimum benefit is calculated as follows:

2%* × $19,000** × 10 years plus 2% × $19,000 × 11/12
$380 × 10 + $380 × 11/12 = $4,148.33

Because the regular retirement benefit payable by the Plan is larger than the minimum retirement benefit, John receives the larger of the two—an annual benefit of $5,079.17 or $423.26 a month.

In addition, John would receive any Social Security benefit for which he is eligible.

Your Early Retirement Benefit

If you are eligible to retire early and choose to do so, your retirement benefit can begin as early as the first of the month after your last day of employment. If you choose to receive your pension early, the benefit is reduced to reflect the longer period of time over which you receive benefits from the Plan. However, you can also decide to defer receiving your benefit until you reach normal retirement age. If you decide to do this, you will receive the full benefit calculated under the retirement formula.

If you choose to receive your pension early, your benefit is reduced:

- .5% for each month that payments start before age 60
- .25% for each month that payments start after age 60 but before age 65

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* Note that if an employee was employed by the Bank prior to January 1, 1982, the minimum benefit formula is based on 1-1/2% rather than 2% of Average Annual Salary.

** John's minimum benefit is based on Average Annual Salary—the average of his highest paying 5 consecutive years during the 10 years prior to the year of retirement ($18,000 + $18,500 + $19,000 + $19,500 + $20,000 divided by 5 = $19,000).

However, the Bank provides an important benefit to early retirees. This reduction does not take effect if at retirement, you have a certain minimum number of years of vesting service, given your age, as shown.

Age at Retirement	Minimum Years of Vesting Service at Retirement
55	35
56	34
57	33
58	32
59	31
60	30
61	29
62	20
63	20
64	20

Your Deferred Retirement Benefit

If you choose, you can defer retirement and work beyond normal retirement. If you do so, your retirement benefit begins on the first of the month coincident with your retirement. Your annual benefit win he calculated exactly as though you had retired at normal retirement. No additional years of service or salary earned after age 65 is taken into account.

If You Leave the Bank Before Retiring

Not every employee win spend his or her entire career with the Bank. If you leave the Bank before retiring, you may still he entitled to receive a pension under the Plan's vesting provision. Vesting is a term used to denote ownership. When you are fully vested, you are entitled to a retirement benefit.

You are fully vested in your pension when you complete 10 years of vesting service. Also, if you were a Plan participant before 12/1/85, you are automatically vested in the Plan at

age 55 provided you are still a participant—regardless of your years of vesting service.

You receive one year of vesting service when you complete at least 1,000 hours of service during a Plan Year.

The retirement benefit you receive is based on the formula in effect at the time you leave the employment of the Bank.

Pension payments begin the first of the month after your 65th birthday. However, if you have 10 years of vesting service (or are automatically vested as described earlier), you may choose to receive your pension as early as the first of the month after your 55th birthday. If you choose to receive your pension early, it will be reduced in the same manner as an early retirement benefit.

There is no partial vesting for fewer than 10 years of vesting service. If you leave the Bank before becoming vested, you will not he entitled to receive any benefits from this Plan.

However, you are always entitled to any contributions you may have made to the Plan, including interest. If you have made contributions to the Plan at any time during your career with the Bank, you can elect from among two payment options to receive them at the time your employment ends. For more information, contact the Benefits Representative in the Personnel Department.

Note that if your accrued benefit is less than $3,500, your Plan payout will be made in a lump sum.

If You Die Leaving Vested Rights

If you should die after leaving the Bank with a vested retirement benefit, and you are married at the time of your death, your spouse is entitled to certain benefits from the Plan. For more information on this benefit, see "If You Die Before Retirement Benefits Begin."

If You Are Rehired by the Bank

If you leave the employment of the Bank and are later rehired, you may receive credit for your earlier service for vesting and calculation of your retirement benefit. The following guidelines apply:

- If you are not vested when you leave, whether or not your earlier period of service will he counted depends on the length of your absence. It will count provided that the length of your absence (i.e., "break-in-service") is either less than 5 consecutive years or does not exceed the length of your earlier period of service. If you meet this guideline, you regain all service earned before the "break-in-service," and you can again participate in the Plan after completing one year of Eligibility Service upon rehire.
- If you are not vested when you leave, and your absence (break-in-service) is either 5 or more consecutive years or exceeds the length of your earlier service whichever is greater, you forfeit your previous service. Upon rehire you can join the Plan after you meet the Eligibility requirements discussed on page 2.
- If you are vested when you leave, you regain all service earned before the absence, and you can join the Plan after you meet its eligibility requirements upon rehire.

A one-year break-in-service occurs when you complete less than 501 hours of service during any Plan Year following the one in which you were hired. However, you will not incur a break-in-service when you are on an approved leave of absence. In addition, you will continue to earn service for vesting and participation credit while you are on an approved leave.

An approved leave of absence is an absence without compensation, approved by the Bank, for sickness, disability, military leave, maternity leave or educational leave. This leave

cannot exceed two years, with the exception of sickness, disability or military leave.

How Your Retirement Benefit Is Paid

Automatic Payment Methods at Retirement

Unless you (and your spouse) elect an optional form of payment, your retirement benefit is paid under an automatic form. The automatic form of payment depends on your marital status.

- *If you are married* on the day your pension begins, you will receive a reduced monthly pension for life so that after you die, 50% of your reduced monthly pension will be paid to your spouse for the remainder of his or her lifetime. This is known as the *Qualified Joint and Survivor Annuity*.
- *If you are not married* on the day your pension begins, you will receive monthly payments for the rest of your life. At the time of death, your benefit payments end. This is known as the *Life Annuity*.

Retirement Benefit Payment Options

Before your retirement benefits begin, you (and your spouse) will have the opportunity to elect an optional form of payment. Here is a brief description of each of these optional forms.

Life Annuity Option. If you are married, you can elect to receive your retirement benefit as a life Annuity (i.e., the automatic form of payment for single employees). Under this option, you receive unreduced benefits for as long as you live. Because there is no continuation of this benefit at the time of your death, it provides the highest monthly benefit.

Joint and Survivor Option. This option provides you with a reduced monthly benefit for life, so that, after you die, a percentage (100%, 75%, 50% etc.) of your reduced monthly ben-

efit will be paid to the beneficiary of your choice for the remainder of his/her lifetime. Note that under this option, your beneficiary does not have to be your spouse.

You will be asked to elect a form of payment within 90 days before your pension is to be paid.

If you are married, but you and your spouse do not want your pension paid automatically as the Qualified Joint and Survivor Annuity, you may choose an optional form of payment. However, you must submit your spouse's written, notarized consent to the Benefits Representative in the Personnel Department, waiving the automatic form. This waiver must be filed within the 90 days before retirement benefits begin.

You can change your payment election, for any reason, within the 90-day period before benefits begin. To do so, you must complete the appropriate terms available from the Benefits Representative in the Personnel Department.

Payment of Small Benefits

If your retirement benefit is less than $25.00 per month, this can be distributed from the Plan in quarterly, semiannual or annual installments—at the discretion of the Retirement Plan Committee.

If the present value of your vested benefit at retirement is less than $3,500, the Committee may choose to pay this as a single lump sum. The decision to do so, however, must be made before benefit payments begin.

If You Die Before Retirement Benefits Begin

If you die before your retirement benefits begin and are married at the time, certain retirement benefits may be available to your spouse.

Your spouse automatically receives monthly payments for life if you:

- completed 10 years of vesting service, or
- participated in the Plan before 12/1/85, and you die anytime after age 55—regardless of your years of vesting service.

This benefit is paid as a Qualified Joint and Survivor Annuity. That is, if you should die after reaching age 55, your spouse's benefit is one-half of the reduced benefit you would have received under the Qualified Joint and Survivor Annuity—calculated as if you had retired the day before your death. If you should die before reaching age 55, your spouse's benefit is one-half of the reduced benefit you would have received under the Qualified Joint and Survivor Annuity—calculated as if you had terminated your employment the day before your death, survived to early retirement age and then died. Note that this benefit is reduced if your spouse is more than 5 years younger than you. The reduction is 1% for each year that exceeds the five-year limit. Payment begins on the first of the month that follows either your death or the date you would have reached age 55—whichever is later.

If you made contributions to the Plan and die before retirement or your spouse dies before all contributions have been paid out, a death benefit equal to your contributions (or those not already paid out) and any earnings on this amount will be paid to your or your spouse's beneficiary.

If You Return to Work After Retirement

After you retire from the Bank, it is possible to return as an active employee. If this occurs, your retirement benefits stop, any optional payment method is cancelled and your earlier service for eligibility, vesting and calculation of your benefit is restored. When you retire again, your benefit is based on all your salary and service, including what you earned following your return to work—as allowed under the Plan. Upon your second retirement, your benefit is reduced by the value of any retirement benefits you already received before you

returned to work. Note that if at any time you work 75 or fewer hours of service during a month, you will be considered retired, and your benefit will he payable.

Social Security at Retirement

In addition to the Bank's Retirement Plan, Social Security provides you with another source of retirement income. During your career, both the Bank and you contribute to the cost of providing Social Security benefits. In addition, your spouse will be eligible for a Social Security benefit as early as when he/she reaches age 62, based upon your earnings history.

Because Social Security benefits are also an important financial resource during retirement, you should contact your local Social Security office within 3 months of the date you plan to retire.

Maximum Benefits

Federal regulations require certain limits on the amount of benefits that can be paid to any individual from a plan of this type. There are individual benefit limits and restrictions on benefit payments to certain highly-paid participants. The rules regarding maximum benefits are complex. If you should become affected by these rules, you will he notified and given an explanation by the Benefits Representative in the Personnel Department.

Other Important Information

Additional details on the administration of the Plan and required legal information may be found in the section "Additional Information."

THE HOWARD SAVINGS BANK
Retirement Plan
Summary Plan Description
September 19, 1995

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Your Retirement Plan benefits are based on your pay throughout your Howard Savings Bank career. Normal retirement generally begins at age 65. In certain circumstances, you can retire earlier. In addition, you may be entitled to benefits even if you leave the Bank before you retire.

The Plan also provides special protection to your spouse if you have earned a right to your retirement benefit and should die before you retire.

Before benefit payments from the Plan begin, you can choose from several forms of payment. For example, a monthly benefit may be paid for your lifetime only, or you can choose to have a portion of your benefit continued to a beneficiary after your death. You must choose a payment option before benefits begin. And, the amount of the monthly benefit you receive depends on your choice.

On October 2, 1992, the Commissioner of Banking of the State of New Jersey appointed the Federal Deposit Insurance Corporation as Receiver for The Howard Savings Bank. On that date, the Receiver gave participants Notice of Cessation of Benefit Accruals, freezing benefit accruals as of 15 days after the date of the notice or upon a participant's earlier termination of employment.

This summary plan description provides highlights of the Retirement Plan in effect as of October 1, 1992. Complete details may be found in the official Plan document. In the event of a discrepancy, the Plan document prevails. If you would like more information, contact the Plan Manager:

Capital Services Corporation
Attention: Howard Savings Bank
1122 Lady Street, Suite 800
Columbia, South Carolina 29211
1-800-808-7905

HOW YOU BECOME ELIGIBLE

You are eligible to participate in the Retirement Plan if you:

- are not a collective bargaining employee,
- have completed one year of Eligibility Service, and
- are at least age 21.

You receive one year of Eligibility Service when you complete 1,000 hours of service during your first year with the Bank or in any Plan Year (December 1 to November 30) after that. No new participants are admitted to the Plan after October 2, 1995.

Hours of Service

Hours of service include each hour you work for which you are paid by the Bank. In addition, hours of service can include scheduled hours during which you do not work, such as vacations, holidays, illness, layoff, jury duty, military duty or approved leaves of absence. However, the Plan does not credit you with more than 501 hours of service for periods during which you do not work. No hours of service are credited for periods after October 2, 1992.

COST OF THE LAW

The Bank pays the cost of the Retirement Plan. You are not required to make any contributions.

WHEN YOU CAN RETIRE

There are three different types of retirement, based on meeting certain eligibility requirements while in the employ of the Bank:

- *normal retirement*—when you have attained age 65 or have completed five years of vesting service, whichever is later
- *early retirement*—as early as age 55 with 10 years of vesting service, and

- *deferred retirement*—when you retire any time after normal retirement.

You receive a year of vesting service when you have completed 1,000 hours of service in a Plan Year.

Normal Retirement

When you reach age 65 and complete five years of vesting service, you become eligible for normal retirement. However, if you participated in the Plan prior to December 1, 1976, there may be situations that could affect your normal retirement eligibility. Contact the Plan Administrator for more information.

If you choose to retire at normal retirement age, payment of your benefit will begin on the first day of the month following the month you meet the eligibility requirements.

Early Retirement

You become eligible for early retirement when you reach age 55 and complete 10 years of vesting service. You can begin to receive retirement benefits on the first day of the month following your termination, or you can delay receipt of your benefits until the first day of any following month.

When you choose early retirement, you collect monthly pension benefits longer than you would if you retired at age 65. As a result, your monthly payments will be reduced by a certain percentage to reflect the longer payment period.

To elect early retirement, you must submit a written application at least three months prior to the date you plan to retire.

Deferred Retirement

If you elect to work beyond normal retirement, you will begin receiving retirement benefits on the first day of the month following your termination from full-time employment. Your

retirement benefit will continue to accrue after your normal retirement until the time you retire.

However, you must begin receiving benefits when you attain the age of 70 1/2, even if you are still actively employed.

HOW YOUR RETIREMENT BENEFIT IS CALCULATED

Prior to March 1, 1992, your annual retirement benefit was based on:

- Annual Salary, and
- Months of Service Credited.

The Plan also had a minimum benefit you would receive if it produces a greater benefit than the benefit provided under the regular retirement formula. The minimum benefit is based on:

- Average Annual Salary and
- Credited Service

Here are definitions of the terms used in calculating your benefit.

Under the *regular retirement formula,* the benefit payable is based on the following:

- Annual salary (December 1 – November 30) is your basic salary determined as of the beginning of the Plan Year. This does not include overtime pay, bonuses and any other special pay. Federal law caps the annual salary that may be taken into account under a qualified plan for very highly compensated executives.
- Months of Service Credited—Each Plan Year you complete 1,000 hours of service or more as a participant, you earn months of credited service. If you complete 1,820 or more hours of service during the Plan Year, you receive credit for 12 months of service. If you complete between 1,000 and 1,820 hours of service, you receive credit for one month's service for each 151 hours of service you complete. If you complete less than 1,000 hours of service

during the Plan Year, you receive no credit for service unless you retire or terminate during that year, and have completed at least 1,000 hours of service during the previous year.

For example, suppose you worked 1,820 hours in 1985 and retired in 1986 after completing 302 hours of service. In this case, you would have received credit for two months of service for 1986 (302/151 = 2).

The *minimum benefit* payable by the Plan is based on the following:

- Average Annual Salary is the average of your annual base salary, determined as of the beginning of the Plan Year, for the 5 consecutive highest paying years during the 10 years prior to the year in which retirement, early retirement or death occurs—whichever is earliest. Base salary does not include overtime pay, bonuses or any other special pay. Federal law caps the annual salary that may be taken into account under a qualified plan for very highly compensated executives.

- Credited Service is the number of months of service you complete with the Bank starting on your date of employment. You can receive up to a maximum of 360 months (30 years) of Credited Service if you were first employed before January 1, 1982, and up to a maximum of 480 months (40 years) of Credited Service if you were first employed after January 1, 1982. If you complete 1,820 or more hours of service during the Plan Year, you receive credit for 12 months of service. If you complete between 1,000 and 1,820 hours of service, you receive credit for one month's service for each 151 hours of service you complete. If you complete less than 1,000 hours of service during the Plan Year, you receive no credit for service unless you retire or terminate during that year, and have completed at least 1,000 hours of service during the previous year.

Your Normal Retirement Benefit To February 1992

Regular Benefit—You can earn a portion of your retirement benefit each year you participate in the Plan. The normal retirement benefit you can earn each year will be calculated using the following formula:

- 2 1/2% of your Annual Salary for the Plan Year—*provided you complete at least 1,820 hours of service*, or
- 2 1/2% of your Annual Salary for the Plan Year times Months of Service Credited divided by 12—*if you complete less than 1,820 but at least 1,000 hours of service*

Minimum Benefit—The minimum benefit payable under the Plan is calculated as follows:

- If you were first employed before January 1, 1982, the minimum benefit is 2% of your Average Annual Salary times your years and fractional years of Credited Service.
- If you were first employed on or after January 1, 1982, the minimum benefit is 1-1/2% of your Average Annual Salary times your years and fractional years of Credited Service.

Note that any benefit earned prior to November 30, 1976 is calculated based on the formula in effect at that time. If applicable, this amount is added to the benefit earned under the formula described here when your total retirement benefit is calculated.

Beginning March 1, 1992, your annual retirement benefit is based on:

- Annual pay—which is your annual base rate of pay as of each December 1. Annual pay does not include overtime, bonuses or any other special pay.
- Social Security Covered Compensation—which is the *35-year average* of the maximum earnings which are subject to Social Security taxes. Social Security covered compensation on changes from year to year. The 35-year aver-

age for the 1992 Plan year (December 1, 1992 - November 30, 1993) is $19,728.

Your Normal Retirement Benefit From March 1992

If you terminated employment on or after March 1, 1992, a benefit for each year of your service on or after March l, 1992 will be calculated this way:

1-1/2% of pay up to Social Security Covered Compensation

PLUS

2% of pay in excess of Social Security Covered Compensation

If applicable, this amount will be added to the benefit earned prior to March 1, 1992 under the formula described above.

YOUR EARLY RETIREMENT BENEFIT

If you are eligible to retire early and choose to do so, your retirement benefit can begin as early as the first of the month after your last day of employment. If you choose to receive your pension early, it will be reduced to reflect the longer period of time over which you receive benefits from the Plan. However, you can also decide to defer receiving your benefit until you reach normal retirement age. If you decide to do this, you will receive the full benefit calculated under the retirement formula.

If you choose to receive your pension early, your benefit is reduced:

- 1/2% for each month that payments start before age 60
- 1/4% for each month that payments start after age 60 but before age 65.

However, the Bank provides an important benefit to career employees. This reduction does not take effect if, at retirement, you have a certain number of years of vesting service, given your age, as shown:

Age at Retirement	Minimum Years of Vesting Service at Retirement
55	35
56	34
57	33
58	32
59	31
60	30
61	29
62	20
63	20
64	20

For example, let's assume you choose to retire at age 60 with less than 30 years of vesting service. If your monthly benefit at normal retirement equals $760, here's how you would calculate your monthly benefit for early retirement:

Step I

The early retirement factor for age 60 equals:
100% – (.25% × 60 months) = 85%

Step II

The early retirement benefit equals:
$760 × 85% = $646 per month.

So, if your normal retirement benefit equalled $760 a month and you retired at age 60, you would receive an early retirement benefit of $646 a month or $7,752 a year.

YOUR DEFERRED RETIREMENT BENEFIT

If you choose, you can defer retirement and work beyond normal retirement. If you do so, your retirement benefit begins on the first day of the month following your termination. Your annual benefit will accrue until you terminate and will be calculated on your actual retirement date.

You cannot defer receipt of your retirement benefit beyond the April 1 following the year in which you reach age 70 1/2.

If you continue to work beyond that date, you will begin to receive your benefit while actively employed.

IF YOU LEAVE THE BANK BEFORE RETIRING

Not every employee will spend his or her entire career with the Bank. If you leave the Bank before retiring, you may still be entitled to receive a pension under the Plan's vesting provision. Vesting is a term used to denote ownership. When you are fully vested, you are entitled to a retirement benefit.

You are fully vested in your pension when you complete five years of vesting service. You are always fully vested in employee contributions you made to the Plan in the past.

You receive one year of vesting service when you complete at least 1,000 hours of service during a Plan Year.

Pension payments generally begin the first day of the month after your 65th birthday. However, you may choose to receive your pension as early as the first day of the month after your 55th birthday, with your benefit reduced actuarially to reflect a longer payment period.

There is no benefit payable if you have fewer than five years of vesting service. That is, if you leave the Bank before becoming vested, you will not be entitled to receive any benefits from this Plan (other than a return of any employee contributions you may have made to the Plan in the past, with interest). However, if you were in employment with the Bank on October 2, 1992, you became fully vested in your accrued benefit under the Plan, as a result the Plan's termination.

Note that when you terminate with a vested benefit, your Plan benefit will be paid in a single lump sum if the value of your accrued benefit is less than $3,500.

If You Die Leaving Vested Rights

If you should die after leaving the Bank with a vested retirement benefit, and you are married at the time of your death, your spouse is entitled to certain benefits from the Plan. For

more information on this benefit, see "If You Die Before Retirement Benefits Begin" on page 14.

If You Are Rehired by the Bank

If you leave the Bank before retirement and are later rehired, you may receive credit for your earlier service for vesting and calculation of your retirement benefit. The following guidelines apply:

- If you are not vested when you leave, whether or not your earlier period of service will be counted depends on the length of your absence. It will count provided that the length of your absence (i.e., "break-in-service") is either less than five consecutive years or does not exceed the length of your earlier period of service. If you meet this guideline, you regain all service earned before the "break-in-service," and you can again participate in the Plan after completing one year of Eligibility Service upon rehire.
- If you are not vested when you leave, and your absence (break-in-service) exceeds both five years and the length of your earlier service, you forfeit your previous service. Upon rehire, you can join the Plan after you meet the eligibility requirements discussed on page 3.
- If you are vested when you leave, you regain all service earned before the absence, and you can join the Plan after you meet its eligibility requirements upon rehire.

A one-year break-in-service occurs when you complete less than 501 hours of service during any Plan Year following the one in which you were hired. However, you will not incur a break-in-service when you are on an approved leave of absence. In addition, you will continue to earn service for vesting and participation credit while you are on an approved leave.

An approved leave of absence is an absence without compensation, approved by the Bank, for sickness, disability, military leave, maternity leave (or other leave relating to the birth or adoption of a child) or educational leave. This leave

cannot exceed two years, with the exception of sickness, disability or military leave.

HOW YOUR RETIREMENT BENEFIT IS PAID

Automatic Payment Methods at Retirement

Unless you (and your spouse) elect an optional form of payment, your retirement benefit is paid under an automatic form. The automatic form of payment depends on your marital status.

- *If you are married* on the day your pension begins, you will receive a reduced monthly pension for life so that, after you die, 50% of your reduced monthly pension will be paid to your spouse for the remainder of his or her lifetime. This is known as the *Qualified Joint and Survivor Annuity*.
- *If you are not married* on the day your pension begins, you will receive monthly payments for the rest of your life. At the time of death, your benefit payments end. This is known as the *Life Annuity*.

Retirement Benefit Payment Options

Before your retirement benefits begin, you (and your spouse) will have the opportunity to elect an optional form of payment. Here is a brief description of each of these optional forms.

- *Life Annuity Option.* If you are married, you can elect to receive your retirement benefit as a Life Annuity (i.e., the automatic form of payment for single employees). Under this option, you receive unreduced benefits for as long as you live. Because there is no continuation of this benefit at the time of your death, it provides the highest monthly benefit.
- *Joint and Survivor Option.* This option provides you with a reduced monthly benefit for life, so that after you die, a

percentage (100%, 66 2/3%, 50%) of your reduced monthly benefit will be paid to the beneficiary of your choice for the remainder of his/her lifetime. Note that under this option, your beneficiary does not have to be your spouse.

You will be asked to elect a form of payment within 90 days before your pension is to be paid.

If you are married, but you and your spouse do not want your pension paid automatically as the Qualified Joint and Survivor Annuity you may choose an optional form of payment. If you elect an optional form of payment, you must submit your spouse's written, notarized consent to the Plan Manager, waiving the automatic form. This waiver must be filed within the 90 days before retirement benefits begin.

You can change your payment election, for any reason, within the 90-day period before benefits begin. To do so, you must complete the appropriate forms available from the Plan Manager.

Payment of Small Benefits

If your retirement benefit is less than $25.00 per month, this can be distributed from the Plan in quarterly, semi-annual or annual installments at the discretion of the Plan Administrator.

If the present value of your vested benefit at retirement is less than $3,500, it will be paid to you as a single lump sum.

Options Upon Plan Termination

The Plan has been amended to permit all participants, other than participants currently receiving benefits from the Plan and participants who are required to receive a lump sum distribution, to elect to receive at Plan termination either (1) a lump sum payment of their accrued benefit, or (2) one of the Retirement Benefit Payment Options described on page 14. The lump sum will be actuarially equivalent to your normal retirement benefit commencing at age 65 (even if you could elect to receive subsidized early retirement benefit). The

spousal consent rules described above apply. The lump sum or Retirement Benefit Payment Option will be paid (or commence) as soon as possible after the Internal Revenue Service and Pension Benefit Guaranty Corporation approve the Plan termination.

IF YOU DIE BEFORE RETIREMENT BENEFITS BEGIN

If you die before your retirement benefits begin and are married at the time, certain retirement benefits may be available to your spouse.

Your spouse automatically receives monthly payments for life if, at the time of your death, you have completed five years of vesting service.

This benefit is paid as a Qualified Joint and Survivor Annuity. That is, if you should die after reaching age 55, but before retirement, your spouse's benefit is one-half of the reduced benefit you would have received under the Qualified Joint and Survivor Annuity—calculated as if you had retired the day before your death.

If you should die before reaching age 55, your spouse's benefit is one-half of the reduced benefit you would have received under the Qualified Joint and Survivor Annuity—calculated as if you had terminated your employment the day before your death, survived to early retirement age and then died.

If you made contributions to the Plan and die before retirement or your spouse dies before all contributions have been paid out, a death benefit equal to your contributions (or those not already paid out) and any earnings on this amount will be paid to you or your spouse's beneficiary.

IF YOU RETURN TO WORK AFTER RETIREMENT

After you retire from the Bank, it is possible to return as an active employee (until October 2, 1992). If this occurs, your retirement benefits stop, any optional payment method is canceled and your earlier service for eligibility, vesting and cal-

culation of your benefit is restored. When you retire again, your benefit is based on all your salary and service, including what you earned following your return to work—as allowed under the Plan. Upon your second retirement, your benefit is reduced by the value of any retirement benefits you already received before you returned to work. Note that if at any time you are credited with 40 or fewer hours of service during a month, you will be considered retired, and your benefit will be payable.

TAXATION OF BENEFITS

The Plan has been designed to meet Internal Revenue Code requirements for qualification and to take advantage of special tax treatment for qualified plans. You will be taxed only when you actually receive benefits from the Plan. The taxation depends on how your benefit is paid to you.

To determine the effect that a Plan distribution will have on your personal income tax situation, you should consult a professional financial advisor.

SOCIAL SECURITY AT RETIREMENT

In addition to the Bank's Retirement Plan, Social Security provides you with another source of retirement income. During your career, both the Bank and you contribute to the cost of providing Social Security benefits. In addition, your spouse will be eligible for a Social Security benefit as early as when he/she reaches age 62, based upon your earnings history.

Because Social Security benefits are also an important financial resource during retirement, you should contact your local Social Security office within three months of the date you plan to retire.

CLAIMS FOR BENEFITS

In order to receive the benefits to which you are entitled under the Plan as described in this booklet, you or your ben-

eficiary must first apply for benefits. Contact Capital Services Corporation for forms and instructions.

The law allows a reasonable amount of time for the Plan Administrator to evaluate a claim and to decide whether to pay benefits based on the information contained in the written claim. However, you have certain rights if your claim for benefits is denied as explained below.

Waiting Period

Within 90 days after you have filed an application for benefits, you must be notified whether or not you will receive the benefits. If the Plan Administrator needs more time because of special circumstances to examine your request, you must be informed within 90 days that additional time is needed, why it is needed, and the date by which you can expect to receive a final decision. However, consideration of your request may be extended for only 90 more days. If your claim is denied, the Plan Administrator must notify you in writing and explain in detail why it was denied. If you receive no answer at all in 90 days—or 180 days if an extension is needed—this may be considered the same as a denial, and you may use the following rules for appealing the denial.

Claims Denial And Appeal Procedures

If an application for Plan benefits is denied in whole or in part, you or your beneficiary will receive written notification. The notification will include the reasons for denial with reference to the specific Plan provisions on which the denial was based, a description of any additional information needed to process the claim, and an explanation of the claim review procedure. Should this happen or if you believe the amount of your benefit payment is wrong, this is how to appeal.

Within 60 days of receiving your initial denial, submit a written request, asking that your claim be reconsidered. Your request should be sent to the Plan Administrator. You are entitled to review all plan documents in preparing your appeal

and also to have a qualified person represent you during the appeals process.

If you believe there is an error in your benefit amount, you can expedite your request by giving the reasons you think there is an error. Also, whenever possible, send copies of any documents or records that support your appeal.

Whether or not you can provide such additional information, your claim will be thoroughly reconsidered after your request is received. Within 60 days (subject to extension under special circumstances), you will receive a written response to your appeal. This will explain the reasons for the decision, and refer to the specific Plan provisions that were the basis for the decision.

OTHER IMPORTANT INFORMATION

This section of the booklet contains information about how the Plan is administered and your rights as a Plan participant as defined under the Employee Retirement Income Security Act of 1974 (ERISA).

Plan Name

The official name of the Plan is "The Howard Savings Bank Retirement Plan." However, for purposes of brevity it is often referred to in this booklet and elsewhere simply as the "Plan."

Plan Type

The Plan is a defined benefit plan as described in ERISA.

Plan Sponsor

The Plan sponsor is The Howard Savings Bank.

Plan Numbers

The Employer Identification Number assigned by the IRS to the Howard Savings Bank is 22-1000990.

The Plan number assigned by the Bank is 001.

Plan Administration

The Plan is administered by the Retirement Committee of the Howard Savings Bank.

Kenneth C. Gorham
Federal Deposit Insurance Corporation
P.O. Box 280402
East Hartford, Connecticut 06128

Capital Services Corporation is the Plan Manager.

Plan Trustee

Employer contributions are placed in a pension trust and managed by First Fidelity, 765 Broad Street, Newark, New Jersey 07102. Plan benefits are paid from the trust.

Plan Year

The Bank maintains records for the Plan Year, beginning on December 1 and ending on November 30.

Maximum Benefits

Federal regulations require certain limits on the amount of benefits that can be paid to any individual from a plan of this type. There are individual benefit limits and restrictions on benefit payments to certain highly-paid participants. The rules regarding maximum benefits are complex. If you should become affected by these rules, you will be notified and given an explanation by the Plan Manager.

Top-Heavy Provision

Under current law, the Retirement Plan and the Incentive and Investment Plan are required to contain certain provisions that would go into effect if the Plan becomes "top-heavy." A benefit plan is considered top-heavy if the present value of the accumulated accrued benefit (or account balances, for the Incentive and Investment Plan) for certain key employees exceeds 60% of the accrued benefits (or account balances) of

all employees. Because of the large number of Bank employees at all levels who participate in the Retirement Plan, it is very unlikely that it will become top heavy. If it does, the Bank will take certain steps to correct the situation.

If the Retirement Plan should become top heavy, the following provisions will become operative:

- Plan participants will be 20% vested in their accrued Plan benefits after completing three years of service, 60% after four years and 100% vested after completing five or more years of service.
- For each year the Plan is top-heavy and you earn a year of service, you will be credited with at least a minimum benefit in the event it is more than the amount you would earn under the Plan's regular benefit formula.
- An overall limit on earnings covered under the Plan will apply.

Nonassignability of Benefits

Benefits payable under the Plan are for the sole use of the participants and their beneficiaries. No one has the right to commute, withdraw or assign the benefits payable to any other individual(s). However, benefits will be paid in accordance with a Qualified Domestic Relations Order (QDRO) if properly served on the Plan. A QDRO is an order or a judgment from a state court directing the Plan Administrator to pay all or a portion of a participant's Plan benefits to a former spouse or dependent.

Pension Benefit Guaranty Corporation (PBGC)

Benefits under the Plan are insured by the Pension Benefit Guaranty Corporation (PBGC) if the Plan terminates. Generally, the PBGC guarantees most vested normal retirement age benefits, early retirement benefits and certain survivor's benefits. However, the PBGC does not guarantee all types of benefits, and the amount of benefit protection is subject to certain limitations.

The PBGC guarantees vested benefits at the level in effect on the date the Plan terminates. However, if benefits have increased within the five years before the Plan termination, the whole amount of the Plan's vested benefits or the benefit increase many not be guaranteed. In addition, the amount of guaranteed monthly benefits is subject to a ceiling which is adjusted periodically.

For more information on the PBGC insurance protection and its limitations, contact the PBGC. Inquiries to the PBGC should be addressed to the Office of Communications, PBGC, 2020 K Street, N.W., Washington, D.C., 20006, or you can call (202) 778-8800.

IRS Approval

The Plan is subject to continuing approval by the Internal Revenue Service (IRS) which makes possible certain tax advantages to you and the Bank. If any changes are required in the Plan affecting your benefits, you will be notified.

Plan Termination Provisions

The Plan may be terminated at any time and for any reason. The Plan will be terminated as a result of the closure of the Bank. If the Plan is ended and you are affected by that termination, you will have a vested or nonforfeitable right to the accrued benefits you have earned. The amount of your benefit, if any, will depend on Plan assets, the terms of the Plan and the benefit guarantee of the PBGC. Plan assets will be shared among Plan participants and beneficiaries according to ERISA in the following order:

1. Certain annuities that participants have been receiving or could have been receiving for three years prior to Plan termination.
2. Other vested benefits guaranteed by the PBGC.
3. Other vested benefits.
4. Remaining Plan benefits.

If the Plan is fully funded, you will receive your full vested accrued benefit.

Once your benefit has been determined, it may be paid in the form of one or more cash payments, or in the form of an insurance company annuity contract which will pay you a monthly income, as described above.

After all benefits have been paid and legal requirements have been met, the Plan will turn over any remaining Plan money to the Bank.

No Guarantee of Employment

Your participation in the Plan does not guarantee your employment with the Bank. In addition, no Plan provision or condition can restrict the Bank's right to terminate your employment.

Plan Documents

While this booklet summarizes the key features of the Retirement Plan, it does not cover all the details. The full terms and conditions of the Plan are described in the official Plan documents. These documents legally govern the operation of the Plan. In the event of a discrepancy between these documents and the summary contained here, the legal documents are controlling.

Copies of the Plan documents are filed with the IRS and are available for review during normal business hours at the Plan Manager's and Plan Administrator's offices.

Upon written request to the Plan Manager, copies of any of these documents will be furnished to any Plan participant or beneficiary within 30 days. The law provides that the Bank may charge up to $.25 per page for these documents.

Your Rights Under ERISA

As a participant in the Plan, you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). These rights are described below.

It is your right to know about your benefits. Therefore, in addition to this booklet describing your benefits, you will automatically receive a summary of the Plans' annual financial reports. You may also examine all Plan documents which are filed with the IRS, such as the detailed annual report. These documents are available for you to examine without charge through the Plan Manager or the Plan Administrator during normal working hours.

You can receive a copy of these documents, for a reasonable charge, by making a written request. If you request these documents in writing and do not receive them within 30 days, you have right to file suit in a federal court. The Bank may be required to pay a fine—up to $100 a day—for each day's delay (unless the delay is beyond the Bank's control), in addition to furnishing the requested documents to you.

You also have the right to expect that the people who are responsible for the operation of the Plan will act prudently and in the best interest of Plan participants and beneficiaries. These people are called fiduciaries. It is our policy—and ERISA requires—that the Plan's fiduciaries act in the best interest of all Plan participants and beneficiaries.

We doubt that you will ever find it necessary to go to court or file suit, but the right is yours and the Bank will not (and cannot) dismiss you or discriminate against you to prevent you from obtaining Plan benefits or exercising any of your rights under ERISA.

Under ERISA, there are steps you can take to enforce your rights. For instance, if a fiduciary has misused funds or if you are discriminated against for asserting your rights, you may ask the Department of Labor for help or you may file suit in a federal court. You also have a right to receive a written explanation if you believe that your claim for benefits was

improperly denied, and the right to have your claim reviewed and reconsidered. If your claim for benefits is denied or ignored, in whole or in part, you have the right to file suit in a state or federal court. The court will decide who should pay court costs and legal fees. If you are successful, the court may order the person you have sued to pay the costs and fees. If you lose, the court may order you to pay these costs and fees—for example, if it finds your claim is frivolous.

If you need additional information or have any questions about your Plan benefits or rights under the law, contact the Plan Manager or Plan Administrator or the nearest Area Office of the U.S. Labor-Management Services Administration, Department of Labor.

Provisions for Legal Action

Normally, the Plan Administrator or the Plan Manager should be able to help you resolve any problems you might have about your rights to benefits. Either source will make available (for a copying charge, if applicable) Plan documents and other related information if you wish to study these materials.

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(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any—

(A) tax credit employee stock ownership plan (as defined in section 409(a) of Title 26), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of Title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.